

# TRANSCRIPT OF RECORD.

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1911.**

**No. 773.**

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**JAMES J. HOOKER AND EZRA E. WILLIAMSON, RESPECTIVELY PRESIDENT AND SECRETARY OF THE RECEIVERS' AND SHIPPERS' ASSOCIATION OF CINCINNATI, OHIO, ET AL., APPELLANTS,**

**vs.**

**MARTIN A. KNAPP ET AL., AS MEMBERS COMPOSING THE INTERSTATE COMMERCE COMMISSION; THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, AND THE UNITED STATES OF AMERICA.**

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**APPEAL FROM THE UNITED STATES COMMERCE COURT.**

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**FILED SEPTEMBER 5, 1911.**

**(22,849.)**





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a United States Commerce Court.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers' and Shippers' Association of Cincinnati, Ohio, Petitioners,

VS.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Respondents.

UNITED STATES OF AMERICA, ss:

Be it remembered, that on the 14th day of July, 1910, came the petitioners in the above-entitled cause, by their solicitors, and filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio their certain bill of complaint and exhibits, in the words and figures following, to wit:

1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Southern District of Ohio, Western Division Thereof.

No. 6641. In Equity.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers' & Shippers' Association of Cincinnati, Ohio, Complainants,

VS.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the Court Aforesaid:

Your orator, James J. Hooker and Ezra E. Williamson, the above named complainants, present this their Bill of Complaint on behalf of themselves and all persons, firms, partnerships, corporations and all mercantile, commercial, industrial and manufacturing associations and societies and members thereof, members

of and represented in the Receivers and Shippers Association hereinafter referred to and all persons, firms, partnership-, and corporations whose interests are similar or substantially similar thereto, and thereupon aver:

2 (1) That this suit is of a civil nature and arises under the constitution and laws of the United States and that the matter and amount in dispute exceed, exclusive of interest and costs, the sum and value of two thousand (\$2,000) dollars.

(2) Your orators, the above named complainants, James J. Hooker and Ezra E. Williamson, are citizens of the state of Ohio, residents and inhabitants of and domiciled in the city of Cincinnati, county of Hamilton, state of Ohio, within said Western Division of said Southern District of Ohio; that said James J. Hooker and Ezra E. Williamson are respectively President and Secretary of said Receivers and Shippers Association, of Cincinnati, Ohio, and duly authorized to represent in this proceeding the members of said The Receivers & Shippers Association; that said Receivers & Shippers Association is a voluntary Association of the city of Cincinnati, county of Hamilton and state of Ohio, composed of a membership of over 250 individuals, firms, partnerships and corporations, including also in its membership the following business organizations of Cincinnati, Hamilton County, Ohio, to-wit:

The Cincinnati Chamber of Commerce & Merchants Exchange,  
 The Business Men's Club,  
 The Manufacturers' Club,  
 The Lumbermen's Club,  
 The Carriagemakers Club,  
 The Live Stock Commission Merchants' Association,  
 The Cincinnati Paint Club and  
 The Cincinnati Branch National League of Commission Merchants.

That the combined membership of the said business organizations, members as aforesaid of said Receivers & Shippers Association, exceed 2500 individuals, firms, partnerships and corporations.

Hereinafter, together with those mentioned in the introductory paragraph of this Bill of Complaint, for brevity called, "Parties Aggrieved."

(3) That said parties aggrieved, to-wit: said persons, firms, partnerships, and corporations, and the members of said mercantile, commercial, industrial and manufacturing associations and societies are engaged in various kinds of mercantile, commercial, industrial and manufacturing pursuits and others similarly situated, in said Hamilton County, State of Ohio, and manufacture and produce goods, wares and merchandise, and sell annually large

3 quantities thereof of great value, to-wit: greatly in excess of the value of several hundred thousand dollars, to purchasers located at Chattanooga, Tennessee, and that said goods, wares and merchandise are enumerated in the freight tariffs and classifications governing same of defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company (herein abbreviated C. N. O. & T. P. Ry. Co.).

That they have invested large sums of money in building up and maintaining their respective lines of business in an amount exceeding the sum of twenty-five million (\$25,000,000) dollars.

(4) That the Interstate Commerce Commission, (herein abbreviated "Commission,") has been created and established, and during all the times herein mentioned has existed and still exists, under and by virtue of an Act of Congress of the United States, entitled: "An Act To Regulate Commerce," approved February 4, 1887, and the acts amendatory thereof and supplemental thereto; it is in substance a body corporate and subject to suit as defendant herein, and is now composed of Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, who are the members composing the said Interstate Commerce Commission.

(5) That said C. N. O. & T. P. Ry. Co. is a corporation, duly organized under the laws of the State of Ohio and has its principal operating office in the said city of Cincinnati, county of Hamilton, state of Ohio, within said Western Division of said Southern District of Ohio; that said C. N. O. & T. P. Ry. Co. is a common carrier, engaged in the transportation of goods, wares and merchandise by railroad from said city of Cincinnati, Ohio to said city of Chattanooga, Tennessee, and that Cincinnati is the northern terminus of said road, and that the city of Chattanooga, Tennessee, is the southern terminus; that said two points constitute the only termini of said road; and the distance by said road from said Cincinnati, Ohio, to said Chattanooga, Tennessee, is 336 miles; that said C. N. O. & T. P. Ry. Co. is a common carrier of Interstate Commerce between said city of Cincinnati, Ohio and said city of Chattanooga, Tennessee, and is in all respects subject to the provisions of said Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof or supplemental thereto;

That said C. N. O. & T. P. Ry. is a single trunk line without branches and running from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee, and it and its operation is entirely distinct from any other railroad or railroad company.

(6) That said parties aggrieved, to-wit, said persons, firms, partnership and corporations and members of said mercantile, commercial, industrial and manufacturing associations and societies, and others similarly situated, ship and shipped as interstate commerce at all times herein alleged said goods, wares and merchandise over said road from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee.

(7) That said C. N. O. & T. P. Ry. Co. at the times herein alleged duly published and duly filed with said Commission a schedule of freight rates on goods, wares and merchandise within various classes for the transportation of said goods, wares and merchandise from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee, which are and were for said classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	76	65	57	47	40	30

Hereinafter for brevity called "76 cent schedule."

(8) That said schedule of rates for said classes set forth in paragraph (7) hereof are extortionate, excessive, unjust and unreasonable, and that taking said C. N. O. & T. P. Ry. Co. by itself, and taking into consideration the cost of construction, the cost of maintenance and profit upon the investment, the said schedule of rates for said classes set forth in paragraph (7) hereof are extortionate, excessive, unjust and unreasonable for the transportation of said goods, wares and merchandise over said C. N. O. & T. P. Ry. from said City of Cincinnati, Ohio, to said city of Chattanooga, Tennessee.

(9) That on November 21, 1894, the Interstate Commerce Commission in case No. 322, Cincinnati Freight Bureau vs. C. N. O. & T. P. Ry. Co., and in case No. 323 Chicago Freight Bureau vs. L. N. A. & C. Ry. Co. on complaint made, duly reported and found that said rates as set forth in paragraph seven (7) herein from Cincinnati, Ohio, to Chattanooga, Tennessee, were unjust and unreasonable and that just and reasonable maximum freight rates would and should be for said classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

Hereinafter for brevity called "60 cent schedule."

(10) That the city of Cincinnati at all of the times herein alleged owned said line of railroad between said city of Cincinnati, Ohio, and Chattanooga, Tennessee, and which is and was at the times herein alleged operated by said C. N. O. & T. P. Ry. Co., that said road was constructed by said city of Cincinnati, Ohio, and opened for business about the year 1880; that the original cost of said railroad was \$18,000,000, and that the city of Cincinnati subsequently expended in terminal facilities about \$2,500,000, making a total cost of said railroad to said city of Cincinnati \$20,500,000.

(11) That said railroad at all times herein alleged and at the present time was and is leased by said city of Cincinnati to said The C. N. O. & T. P. Ry. Co. and that the rental of the same for a number of years prior to 1906 was \$1,250,000 per year, or a return of about six per cent. per annum to said city of Cincinnati upon the cost of said property; that the rental paid and to be paid by said C. N. O. & T. P. Ry. Co. to said city of Cincinnati during the first twenty years of a sixty-year lease from 1906 is \$1,050,000 per year and somewhat more for the balance of forty years of said term, thus yielding a return to said city of Cincinnati, Ohio, in excess of five per cent. per annum upon the cost of said property.

(12) That the city of Cincinnati, Ohio, has for some time last past paid three and a half per cent. per annum upon bonds for money borrowed for the construction of said railroad and the building of said terminals and it is now and has for some time last past



cleared a profit of one and one-half per cent. per annum upon its investment.

(13) That said C. N. O. & T. Ry. Co. owns its own equipment and has not now and never did have any interest in said property leased by it from said city of Cincinnati, Ohio, beyond the right to use said property for railroad purposes for the aforesaid terms.

(14) That the capital stock of said C. N. O. & T. P. Ry. Co. for the years 1903 to 1908 inclusive was \$5,000,000, divided into \$3,000,000 common stock and \$2,000,000 preferred stock; about the year 1908 the said C. N. O. & T. P. Ry. Co. added to its preferred stock \$500,000, making the total capital stock of the said C. N. O. & T. P. Ry. Co. between 1908 and the present time \$5,500,000.

(15) That the value of all the property of said C. N. O. & T. P. Ry. Co. between 1903 and 1908 inclusive was \$5,000,000 and between 1908 and the present time \$5,500,000, and that during said respective periods was all the property which said C. N. O. & T. P. Ry. Co. devoted to and employed in the public-service and use, and for the public convenience.

6 (16) That the number of tons of freight hauled; the number of tons of freight hauled one mile and the number of tons of freight hauled one mile per mile of road by said C. N. O. & T. P. Ry. Co. over said road between the years 1884 and 1908, both inclusive were as follows:

Year.	Number tons freight hauled.	Number tons freight hauled one mile.	Number tons freight hauled one mile per mile road.
1884	917,292	166,453,790	495,398
1885	979,421	179,614,266	534,566
1886	1,169,609	210,274,950	625,818
1887	1,421,341	247,409,159	736,336
1888	1,576,340	294,132,332	875,393
1889	1,737,060	298,910,667	889,615
1890	1,923,306	332,873,387	990,694
1891	2,004,418	351,572,982	1,055,276
1892	2,181,426	407,754,394	1,213,527
1893	2,110,679	407,968,022	1,214,190
1894	1,765,437	330,415,184	986,354
1895	1,934,268	348,104,084	1,036,321
1896	2,109,147	355,048,601	1,056,692
1897	2,063,492	354,445,485	1,054,897
1898	2,458,762	423,425,738	1,260,195
1899	2,763,546	481,694,704	1,433,615
1900	3,192,020	540,379,661	1,608,272
1901	2,998,020	506,708,131	1,508,059
1902	3,477,428	601,185,071	1,789,241
1903	3,834,141	662,589,351	1,971,992
1904	3,860,712	688,461,807	2,048,993
1905	4,026,287	730,727,269	2,174,783
1906	4,905,687	890,454,630	2,656,162
1907	4,852,253	856,922,467	2,550,364
1908	4,299,008	775,962,245	2,309,411

- 7 (17) That the gross earnings; the gross earnings per mile and the receipts per ton per mile in cents, of said C. N. O. & T. P. Ry. Co. between the years 1884 and 1908, both inclusive, were as follows:

Year.	Gross earnings.	Gross earnings per mile.	Receipts per ton per mile Cents.
1884	\$2,658,184	\$7,911.26	1.10
1885	2,681,547	7,980.79	1.03
1886	2,882,171	8,577.89	.99
1887	3,377,551	10,052.24	.99
1888	3,624,490	10,787.17	.89
1889	3,665,859	10,883.12	.89
1890	4,309,144	12,824.83	.92
1891	4,379,143	13,033.16	.88
1892	4,337,498	12,909.22	.78
1893	4,174,970	12,425.51	.74
1894	3,576,979	10,645.77	.76
1895	3,487,942	10,380.78	.72
1896	3,685,865	10,969.83	.73
1897	3,440,506	10,239.60	.72
1898	4,128,118	12,286.07	.70
1899	4,691,232	13,962.00	.68
1900	5,124,241	15,250.72	.73
1901	5,045,596	15,016.65	.74
1902	5,660,404	16,846.44	.71
1903	6,155,454	18,319.81	.71
1904	6,768,744	20,145.07	.75
1905	7,358,618	21,905.86	.73
1906	8,454,896	25,163.38	.72
1907	8,763,773	26,082.66	.76
1908	7,801,378	23,434.62	.76

- 8 (18) That the net earnings and the net earnings per mile of said C. N. O. & T. P. Ry. Co. from the operation of said road between the years 1884 and 1902, both inclusive, were as follows:

Year.	Net earnings.	Net earnings per mile.
1884	\$904,010	\$2,690.51
1885	1,064,811	3,169.08
1886	1,128,292	3,358.01
1887	1,342,979	3,996.96
1888	1,204,954	3,856.17
1889	1,145,256	3,409.32
1890	1,580,963	4,705.24
1891	1,354,640	4,031.66
1892	1,137,688	3,385.98
1893	998,715	2,972.37
1894	911,764	2,713.58
1895	976,787	2,907.05

1896 .....	1,039,992	3,095.21
1897 .....	1,097,325	3,265.85
1898 .....	1,549,682	4,612.15
1899 .....	1,739,006	5,175.61
1900 .....	1,605,659	4,788.75
1901 .....	1,501,827	4,467.21
1902 .....	1,636,797	4,868.57

(19) That between said years 1884 and 1902, both inclusive, said C. N. O. & T. P. Ry. Co. improperly devoted out of its earnings certain sums of money, the exact amount of which your orators do not know and can not ascertain, to permanent improvements and additional rolling stock which were in no manner any part of the fixed charges or operating expenses, and which properly belonged to capital account and should have been credited to the net earnings of the said C. N. O. & T. P. Ry. Co., and which, if so properly credited would have shown a larger amount to the credit of net earnings and net earnings per mile between said years 1884 and 1902, both inclusive, than as stated in the preceding paragraph.

9 (20) That between the years 1903 and 1908, both inclusive, said C. N. O. & T. P. Ry. Co. expended for permanent improvement and new rolling stock the following sums of money for the following items, to-wit:

Bridges .....	\$2,274,424.22
Terminal Facilities, including yards and freight houses .....	2,132,000.00
Shops .....	546,000.00
Water Stations .....	35,000.00
Double track and change in grade.....	2,212,829.84
Sidings .....	676,000.00
Station Buildings .....	82,200.00
Signals .....	201,761.73
Engines .....	1,175,540.00
Passenger cars .....	140,763.00
Freight cars .....	3,936,119.00
Total.....	\$13,412,637.79

That prior to the year 1903 said C. N. O. & T. P. Ry. Co.'s capital stock was \$3,000,000.00 common stock, and in the year 1903 said company increased its capital stock by the issue and sale of \$2,000,000.00 preferred stock of said company and realized \$2,000,000.00 from said sale and applied said \$2,000,000.00 on account of purchase of said engines and said freight cars above referred to.

That said C. N. O. & T. P. Ry. Co. on April 1, 1906, borrowed \$1,500,000.00 and issued notes therefor and applied the proceeds of said notes to pay for construction of double track, changing of grades, and rebuilding and strengthening bridges, as above indicated.

That on December 2, 1907, said C. N. O. & T. P. Ry. Co. borrowed \$500,000 and issued notes therefor and applied the proceeds

of said notes to pay for rebuilding bridges and construction of double track, as above indicated.

That between said years 1903 and 1908, both inclusive, said C. N. O. & T. P. Ry. Co. took up and paid \$683,000 of said notes so issued and said \$683,000 was taken out of its earnings.

That said \$2,000,000 derived from the sale of said preferred stock and said \$2,000,000 derived from the issue of said notes, less said \$683,000, to-wit, \$3,317,000, was part of the expenditure of 10 said \$13,412,637.79 and that the balance, to-wit, the sum of \$10,095,637.79, was taken and paid out of the earnings of said C. N. O. & T. P. Ry. Co.

That said C. N. O. & T. P. Ry. Co. between said years of 1903 and 1908, both inclusive, expended out of its earnings the sum of \$1,023,789.79 for securities which are still owned by said C. N. O. & T. P. Ry. Co.

That the amount expended by said C. N. O. & T. P. Ry. Co. out of its earnings between the years 1903 and 1908, both inclusive, for said permanent improvements, said new rolling stock and said securities amounted to \$11,119,427.58.

That your orators have no means of ascertaining and therefore can not allege how much was so expended for said permanent improvements, said new rolling stock and said securities during each of said years, but alleges and show to the Court that the average yearly amount so expended by said C. N. O. & T. P. Ry. Co. out of its earnings for said permanent improvements, said new rolling stock and said securities was \$1,853,237.93, and that the yearly amounts during the first three years were below said average and for the last three years above said average.

(21) That between said years 1903 and 1908, both inclusive the net earnings of said C. N. O. & T. P. Ry. Co. were as follows:

Year.	Part of net earnings, before deducting rentals, interest and taxes, not expended for said permanent improvements, said new rolling stock and said securities.	Balance of net earnings expended for said permanent improvements, said new rolling stock and said securities—yearly average.
1903 .....	\$1,722,009.00	\$1,853,237.93
1904 .....	1,813,422.00	1,853,237.93
1905 .....	1,933,772.00	1,853,237.93
1906 .....	2,278,226.00	1,853,237.93
1907 .....	1,948,342.00	1,853,237.93
1908 .....	1,956,980.00	1,853,237.93

That the net earnings of said C. N. O. & T. P. Ry. Co., before deducting rentals, interest and taxes, of said road, made up of the said two sums, as aforesaid, and the net earnings per mile 11 between said years 1903 and 1908, both inclusive, are respectively as follows:

Year.	Net earning-before deducting rentals, interest and taxes.	Net earnings per mile before deducting rentals, interest and taxes.
1903 .....	\$3,575,246.93	\$10,637.47
1904 .....	3,666,659.93	10,912.66
1905 .....	3,787,009.93	11,272.22
1906 .....	4,131,463.93	12,296.01
1907 .....	3,801,579.93	11,309.39
1908 .....	3,810,217.93	11,349.30

(22) That between said years 1903 and 1908, both inclusive, the net earnings of said C. N. O. & T. P. Ry. Co. after deducting rentals, interest and taxes were as follows:

Year.	Part of net earnings, after deducting rentals, interest and taxes, not expended for said permanent improvements, said new rolling stock and said securities.	Balance of net earnings expended for said permanent improvements, said new rolling stock and said securities—yearly average.
1903 .....	\$463,185.23	\$1,853,237.93
1904 .....	373,323.65	1,853,237.93
1905 .....	382,449.60	1,853,237.93
1906 .....	387,764.34	1,853,237.93
1907 .....	334,644.89	1,853,237.93
1908 .....	267,509.91	1,853,237.93

(23) That the net profits of said C. N. O. & T. P. Ry. Co., after deducting rentals, interest and taxes of said road and all operating expenses and every other expense and charge between said years 1903 and 1908, both inclusive, are the sum of the respective items given in paragraph (22) hereof and are as follows:

Year.	Net profits.
1903.....	\$2,316,123.16
1904.....	2,227,571.58
1905.....	2,235,687.53
1906.....	2,241,002.27
1907.....	2,187,882.82
1908.....	2,120,747.84
Total for 6 years.....	\$13,329,315.20

Your orators show that as set forth in paragraph 20 of the Bill of Complaint, *that* your orators could not ascertain the exact amount expended each year for permanent improvements, new rolling stock and securities and thereupon gave a yearly average thereof, and that the figures above given as the net profits *is* a result of said average and that as a matter of fact, there was a smaller amount so expended during the three years from 1903 to 1905 both inclusive than during the three years of 1906 to 1908, both inclusive, and that corre-



spondingly the net profits for each of said years 1903 to 1905 both inclusive, are less than there given and that the net profits for the years 1906 to 1908, both inclusive are larger than there given, but that the aggregate of said years 1903 to 1908 both inclusive is a correct statement of said net profits and that your orators are without means of giving more accurately said net profits per year than as set forth in this paragraph.

(24) That the net profits shown in paragraph 23 hereof when divided by the mileage of said C. N. O. & T. P. Ry. Co., namely 336 miles gives a net profit per mile for the years 1903 to 1908, both inclusive, as follows:

Year.	Net profit per mile.
1903.....	\$6,894.11
1904.....	6,629.64
1905.....	6,653.83
1906.....	6,669.64
1907.....	6,511.55
1908.....	6,311.74

(25) Your orators show that the sum of the net profits of said C. N. O. & T. P. Ry. Co. as set forth in paragraph 23 hereof for the years 1903-1908 both inclusive was \$13,329,315.20, equivalent to a yearly average of net profits thereon for said six years of \$2,221,552.53 after deducting rentals, interest, taxes and all operating expenses and every other charge and expense.

(26) That the value of the said property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and for the public convenience between said years 1903 and 1908 both inclusive was \$5,000,000.00 represented by five million dollars of outstanding and issued capital stock of the par value of \$5,000,000.00, and that the percentage of said net profits earned thereon by said C. N. O. & T. P. Ry. Co. *thereon* between the years 1903 and 1908 amounted to 266.58 per cent. and that the yearly average of said net profits so earned for each of said six years amounted to 44.43 per cent. per annum.

(27) Your orators further show that on November 24, 1894, as set forth in paragraph (9) thereof, the Interstate Commerce Commission prescribed as just and reasonable maximum rates  
13 for said classes in cents per hundred pounds as follows:

Class .....	1	2	3	4	5	6
Rate .....	60	54	40	30	24	22

That if said rates had been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903-1908 both inclusive, the annual average net profits of said C. N. O. & T. P. Ry. Co. would, on the same tonnage have been reduced annually by a sum not to exceed \$188,651.30; that the average annual net profits of said C. N. O. & T. P. Ry. Co. for the years 1903-1908 both inclusive, would then have been the difference between \$2,221,552.53 shown

in paragraph (25) hereof and said sum of \$188,651.30, namely, \$2,032,871.23; that said annual net profits of \$2,032,871.23 is equivalent to an annual return upon the value of the property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and the public convenience as set forth in paragraph (26) hereof and represented by \$5,000,000.00 capital stock of said C. N. O. & T. P. Ry. Co. of 40.66 per cent. per annum or a total of 242.96 per cent. for the six years 1903 to 1908 both inclusive.

(27a) Your orators further show that if the schedule of rates for said classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

prescribed by the said Commission in its order in case No. 1542, referred to in paragraph (28) hereof had been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903-1908, both inclusive, the annual average net profits of said C. N. O. & T. P. Ry. Co. would on the same tonnage have been reduced annually by a sum not to exceed \$12,000; that the average annual net profits of said C. N. O. & T. P. Ry. Co. for the years 1903-1908, both inclusive, would then have been the difference between \$2,221,552.53 shown in paragraph (25) hereof, and said sum of \$12,000, namely, \$2,209,552.53; that said annual net profit of \$2,209,552.53 is equivalent to an annual return upon the value of the property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and for the public convenience as set forth in paragraph (25) hereof and represented by \$5,000,000 capital stock of said C. N. O. & T. P. Ry. Co. of 44.18 per cent. per annum, or a total of 265.08 per cent. for the six years, 1903-1908, both inclusive.

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## II.

(28) That on the 30th day of April, 1908, said Receivers' & Shippers' Association, a voluntary association in the City of Cincinnati, County of Hamilton and State of Ohio, with a membership of over 250 individuals, firms, partnerships and corporations, and including also in its membership the following business organizations of Cincinnati:

- The Chamber of Commerce,
- The Business Men's Club,
- The Manufacturers' Club,
- The Lumbermen's Club,
- The Pork Packers & Slaughterers' Association,
- The Carriage Makers' Club,
- The Live Stock Commission Merchants' Association,
- The Cincinnati Furniture Exchange,
- The Queen City Furniture Club,
- The Cincinnati Paint Club,
- The Pine Lumber Dealers' Association.

The Cincinnati Branch National League of Commission Merchants, filed its complaint with said Commission against said C. N. O. & T. P. Ry. Company, complaining that the rates for the service set forth in paragraph (7) herein were unjust and unreasonable and that said Commission should prescribe just and reasonable rates and said complaint was numbered 1542.

(29) That said complaint number 1542 as aforesaid was duly investigated by said Commission upon the pleadings and the evidence and the case of complainant was as set forth in paragraphs (5) to (27) both inclusive of this Bill of Complaint and that on said investigation the facts set forth in paragraphs (5) to (27) both inclusive of this Bill of Complaint were conceded and undisputed and said case was duly made out and established.

(30) That the receipt of evidence on said investigation by said Commission was closed and concluded on the — day of January, 1909, and said complaint was duly argued and submitted to said Commission on the 10th day of May, 1909; that on the 24th day of May, 1910, said Commission made, handed down, filed and entered a report in writing in respect thereto which said report stated the findings of fact and conclusions of said Commission together with its decision, order and requirements in the premises, and which report contained the findings of fact and conclusions thereon of said Commission, and that said report was referred to and made part

15 of the order entered therein. That said report although only handed down on the 24th day of May, 1910, was dated as of Feb. 17, 1910. That said complete report (including the order) is hereto attached and made part hereof and identified as Exhibit "A."

(31) That said Commission in its said report, findings of fact and conclusions thereon, and its order and requirements therein, which said report, findings of fact and conclusions thereon were by said Commission referred to and made part of the order therein, said Commission duly found as follows:

(a) That the questions (1) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee, over said railroad were inherently unreasonable and unreasonable considered in and of themselves; (2) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee over said railroad were extortionate; and (3) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee, over said railroad were too high, were presented to said Commission; that in so finding said Commission used the following language:

"Second, are the rates upon these numbered classes from Cincinnati and Chicago to Chattanooga unreasonable considered in and of themselves (18 I. C. C. R. p. 452).

And again:

"The chief contention of the complainants is that these charges are extortionate in view of the circumstances under which the service is rendered." (18 I. C. C. R. ps. 457, 458.)

And again:

"This brings us to the inherent reasonableness of these rates themselves." (18 I. C. C. R. p. 459.)

And again:

"The complainants insist that these rates from Cincinnati to Chattanooga considered as transportation charges for the service rendered are too high." (18 I. C. C. R. p. 459.)

(b) That said C. N. O. & T. P. Ry. is a single trunk line without branches running from Cincinnati to Chattanooga; that said C. N. O. & T. P. Ry. Co. is known as the Cincinnati Southern Railroad; that said Commission in so finding used the following language, to-wit:

"The Cincinnati Southern Railroad is a single trunk line without branches running from Cincinnati to Chattanooga." (18 I. C. C. R. p. 465.)

16 (c) That the operation of said C. N. O. & T. P. Ry. Co. is entirely distinct from that of any other railroad; that said commission in so finding used the following language:

"Its (C. N. O. & T. P. Ry. Co.) operation is in fact entirely distinct from that of the Southern Railway." (18 I. C. C. R. p. 457.)

Said Commission also used the following language:

"We must under this construction of the law dispose of this case as though these two companies (C. N. O. & T. P. Ry. Co. and the Southern Railway Co.) were distinct in fact as well as in name and in operation." (18 I. C. C. R. p. 457.)

(d) That said Cincinnati Southern Railroad leading from the said City of Cincinnati, Ohio, to said City of Chattanooga, Tenn., is and was operated by the C. N. O. & T. P. Ry. Co. and is known as the Cincinnati Southern; that it was constructed by the City of Cincinnati, being opened for business about the year 1880; that the original cost of said railroad was \$18,000,000.00 and that said City of Cincinnati subsequently expended in terminal facilities about \$2,500,000.00 making a total cost of \$20,500,000.00; that said Commission in so finding used the following language, to-wit:

"The railroad leading from Cincinnati to Chattanooga and now operated by the Cincinnati, New Orleans and Texas Pacific Company is the Cincinnati Southern. It was constructed by the City of Cincinnati, being opened for business about the year 1880. The original cost of the railroad was \$18,000,000.00 and the City subsequently expended in terminal facilities about \$2,500,000.00 making a total cost of \$20,500,000.00." (18 I. C. C. R. p. 460.)

(e) That the City of Cincinnati had legislative authority to build, but not to operate said railroad, and that said C. N. O. & T. P. Ry. Co. was organized for the purpose of leasing and operating said Cincinnati Southern Railroad; that the first lease thereof was for a term of twenty-five years and expired in 1906; that said lease was extended by popular vote in the year 1901 for a term of sixty years, and that thereby said lease will expire in the year 1966; that the rental under said original lease was \$1,250,000.00 per year and yielded said City of Cincinnati approximately six per cent. upon

the cost of said property; that the rental under said extended lease was \$1,050,000.00 per year during the first twenty years thereof and provided for a somewhat larger rental for the balance of the term, yielding said City of Cincinnati a return in excess of 5 per cent. upon the cost of the property; that said City of Cincinnati borrowed said money for 3½ per cent. and that said City of Cincinnati made a clear profit of 1½ per cent. upon the transaction; that said Commission in so finding used the following language:

"The City of Cincinnati had legislative authority to build but not to operate this railroad and the Cincinnati, New Orleans & Texas Pacific Railway Company was organized for the purpose of leasing and operating the Cincinnati Southern Railroad. The first lease was for twenty-five years and expired in 1906, but this lease was extended by popular vote in the year 1901 for a term of sixty years so that the present lease expires in 1966. The rental under the original lease was \$1,250,000.00 per year, or about 6 per cent upon the cost of the property. The rental under the present lease during the first twenty years of the term is \$1,050,000.00 per year, somewhat more for the balance, thus yielding a return in excess of 5 per cent upon the cost of the property. The City borrows this money for 3½ per cent, thereby making a clear profit of 1½ per cent upon the investment." (18 I. C. C. R. p. 460.)

(f) That since 1899 said C. N. O. & T. P. Ry. Co. has paid all rentals and shows very handsome returns from operation; that said railroad is unique among railroads in the South; that its gross earnings per mile for the year 1907 were over \$26,000, which was more than the average gross earnings of the railroads in any group in the United States, and more than the gross earnings of most railroad systems of the United States; that during the year 1907 said C. N. O. & T. P. Ry. carried more tons of freight one mile than the average in any group of the United States; that its tonnage and its gross earnings per mile were approximately four times that of the Southern Railway; that said Commission in so finding in reference to said C. N. O. & T. P. Ry. since 1899, used the following language:—

"Since that time it has paid the stipulated rental and has shown very handsome returns from operations as well. This property to-day is unique among railroads in the South. Its gross earnings per mile for the year 1907 were over \$26,000.00, more than the average gross earnings of the railroads in any group in the United States and more than the gross earnings of most railroad systems in the United States. It carried during the year 1907 more tons of freight one mile than the average in any group in the United States. Its tonnage and its gross earnings per mile were nearly four times those of the Southern Railway by which it is controlled." (18 I. C. C. R. 461.)

(g) That said C. N. O. & T. P. Ry. Co. owns its equipment but has no interest in the Cincinnati Southern Railroad beyond the right to use it for the stipulated term; that said Commission in so finding used the following language:



"The Company (C. N. O. & T. P. Ry. Co.) owns the equipment but has no interest in the railroad (Cincinnati Southern Railroad) beyond the right to use it for the stipulated term." (18 I. C. C. R. p. 462).

(h) That said C. N. O. & T. P. Ry. Co. has no right to pledge the bridges or tracks of the said Cincinnati Southern Railroad to raise money to reconstruct bridges or lay additional tracks; that said C. N. O. & T. P. Ry. Co. was merely entitled to a fair return upon the value of the property devoted by it to the public use and that said C. N. O. & T. P. Ry. Co. was not entitled to have property acquired by it paid for by the public; that the stockholders of said C. N. O. & T. P. Ry. Co. had entered upon their investment without the aid of any necessary funds with which to carry it on; that for that reason said stockholders of said C. N. O. & T. P. Ry. Co. had no right to impose unreasonable rates; that said C. N. O. & T. P. Ry. Co. and its stockholders had no right to make a rate unreasonable for the purpose of supplying money to make permanent improvements by way of bridges, additional tracks, and otherwise; that said Commission in so finding used the following language:—

"If therefore, it is found necessary to reconstruct a bridge or lay an additional track, the company (C. N. O. & T. P. Ry. Co.) cannot pledge that bridge or track for the necessary money with which to make the improvement.

"The testimony shows that in order to handle the business offering, it has been necessary already to expend large sums in the improvement of the roadway and structure, and that further large sums must be expended in the future. This money, say the defendants, can only be obtained from income from operation, and hence a sufficient rate should be allowed to permit the making of these necessary additions.

"This position is not well taken. A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, but it is not entitled to have that property paid for by the public. This commission has so decided in *Central Yellow*

19 *Pine Ass'n v. I. C. R. R. Co.* 10 I. C. C. Rep. 505, and the

Supreme Court has affirmed the correctness of this holding in *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441. If these stockholders have entered upon this enterprise without the means to provide necessary funds with which to carry it on, that can be no reason for the imposition of rates otherwise unreasonable." (18 I. C. C. R. p. 462.)

(i) That the grades of the said C. N. O. & T. P. Ry. from said City of Cincinnati, Ohio, to said Chattanooga, Tennessee, were heavy, exceeding for 38 per cent. of its distance a one per cent. grade, and that the cost of operation and maintenance was high; but that nevertheless the net earnings of said C. N. O. & T. P. Ry. Co. computed upon a basis prescribed by the Interstate Commerce Commission had for several years then last past reached \$7,000 per mile, and that if it were the duty of said Interstate Commerce Commission to take said railroad by itself and to determine the reasonableness of the rates complained of by reference to cost of con-

struction and cost of maintenance and profit upon the investment that the complainant in said case No. 1542 had established their case, and that the rates ought fairly to be reduced by as great an amount as was formerly found reasonable by said Commission which rates as to classes so formerly found by said Commission in cents per hundred pounds were as follows:

Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

That in so finding said Commission used the following language:—"The grades of this railroad are heavy, exceed for 38 per cent. of its distance a one per cent. grade, and the cost of operation and maintenance is high, but nevertheless its net earnings computed upon the basis prescribed by the Interstate Commerce Commission, have for several years last past reached \$7,000 per mile. If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission." (18 I. C. C. R. p. 461).

### III.

(32) Your orators show that it was the duty of the Commission in determining what rates were just and reasonable on said 20 classes of goods, ware and merchandise from Cincinnati, Ohio, to Chattanooga, Tennessee, to consider the cost of operation and maintenance and compute its net earnings upon the basis prescribed by the Interstate Commerce Commission and to treat said Railroad by itself, and to determine the reasonableness of said rates by reference to cost of construction, cost of maintenance and profit upon the investment, and that upon said report of said Commission containing its findings of fact and conclusions thereon and made part of its order, said Commission should have entered an order as to said class rates as so found by said Commission to be just and reasonable not to exceed in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

(33) Your orators further show that notwithstanding said report containing said findings of fact and conclusions thereon which were embodied in and made part of its order, that said Commission merely required the C. N. O. & T. P. Ry. Co. to cease and desist on or before the 15th day of July, 1910, from exacting rates and notifying said The Cincinnati, New Orleans & Texas Pacific Railway Company to establish on or before the 15th day of July, 1910, and maintain in force thereafter, during a period of not less than two years rates for the transportation of articles in

said numbered classes, not to exceed in cents per hundred pounds as follows:—

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

Herein for brevity called "70 cent schedule."

#### IV.

(34) Your orators further show that said Commission in said case No. 1542 interpreted and applied the Act of Congress of the United States entitled "An Act to Regulate Commerce" approved February 4, 1887, and the Acts amendatory thereof and supplementary thereto without regard to their terms and requirements and without regard to other statutes of the United States and without regard to the limitations imposed by the Constitution of the United States and the Amendments thereto, particularly the limitations imposed by Article V of the Amendments to the Constitution of the United States which provides:—

(a) "No person \* \* \* shall be deprived of \* \* \* property without due process of law."

(b) "Nor shall private property be taken for public use without just compensation."

21 (35) Your orators further show that the money which the parties aggrieved are required to pay to said C. N. O. & T. P. Ry. Co., under said schedules of rates, for the transportation of any and all shipments of goods, wares, and merchandise made by parties aggrieved, from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee, is property and private property, within the meaning of the fifth amendment to the Constitution of the United States.

(36) Your orators further show that as set forth in paragraph (31) sub-paragraph (i), said Commission found that taking said railroad by itself and determining the reasonableness of said schedule of rates by reference to cost of construction, cost of maintenance, and profit upon the investment, complainants in said case No. 1542 had established their case, and that said schedule of rates ought fairly to be reduced by as great an amount as was formerly found reasonable by said Commission; the rates so formerly found reasonable were as per schedule in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

and that said finding was a determination that said 60-cent schedule afforded a reasonable return to said C. N. O. & T. P. Ry. Co. on its property employed in and devoted to the public use, and for the public convenience, and that said 60 cent schedule was a reasonable and just schedule of rates for the said transportation service performed by the said C. N. O. & T. P. Ry. Co. from said city of Cincinnati, Ohio, to the said city of Chattanooga, Tennessee.

That the parties aggrieved, on any and all shipments of goods, wares and merchandise made by said parties aggrieved, under said respective classes, from the city of Cincinnati, Ohio, to the city of Chattanooga, Tennessee, are deprived of their property without due process of law in this, to-wit: that notwithstanding said finding, said Commission, by its order, required said C. N. O. & T. P. Ry. Co. to establish on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for transportation of articles in the numbered classes of the Southern Classification, from Cincinnati, Ohio, to Chattanooga, Tennessee, not to exceed the following in cents per hundred pounds.

Classes	..... 1	2	3	4	5	6
Rates	..... 70	60	53	44	38	29

and thereby licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally, and unlawfully to take said private property of the parties aggrieved and to transfer the ownership thereof to the ownership and into the treasury of the said C. N. O. & T. P. Ry. Co., to the amount and extent of the differences between the said 60 cent schedule and the said 70 cent schedule of rates, in cents per hundred pounds, for the respective classes, as follows:

Classes	..... 1	2	3	4	5	6
Differences	.... 10	6	13	14	14	7

That said differences between the said two schedules of rates, in cents per hundred pounds, namely:

Classes	..... 1	2	3	4	5	6
Differences	.... 10	6	13	14	14	7

represent the amounts and value of said private property of the parties aggrieved which the said Commission by its said order licensed, empowered and authorized said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully take from the said parties aggrieved, and transfer the ownership of said private property to the ownership and into the treasury of the said C. N. O. & T. P. Ry. Co.

That said C. N. O. & T. P. Ry. Co., by charging and collecting said 70 cent schedule of rates on any and all shipments of goods, wares and merchandise under said respective classes, made by the parties aggrieved from Cincinnati, Ohio, to Chattanooga, Tennessee, and the authority given by said order of said Commission, to so take the private property of the parties aggrieved in the manner aforesaid, deprives said parties aggrieved of said private property unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully, and therefore without due process of law,

to the amount and extent of said differences, in cents per hundred pounds for said respective classes.

Your orators further show that the parties aggrieved, on any and all shipments of goods, wares and merchandise, under said respective classes made by the parties aggrieved from said city of Cincinnati, O., to said city of Chattanooga, Tenn., are deprived of their property without due process of law in this, to-wit; that said commission, by its order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully levy a tax upon the parties aggrieved to the amount and extent of said differences hereinbefore set forth; and said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully levy tribute on the parties aggrieved to the amount and extent of said differences hereinbefore set forth; and said Commission by its order licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, arbitrarily, unconstitutionally and unlawfully confiscate the said private property of the parties aggrieved to the amount and extent of said differences hereinbefore set forth; that said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully to make an enforced contribution to said C. N. O. & T. P. Ry. Co. to the amount and extent of said differences hereinbefore set forth; that said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to levy and collect said tax, levy and collect said tribute, and confiscate and collect said amounts and enforce and collect said contributions for the use and benefit of said C. N. O. & T. P. Ry. Co. and its stockholders.

(37) Your orators further show that the parties aggrieved, on any and all shipments of goods, wares and merchandise made by said parties aggrieved, under the respective classes, from said city of Cincinnati, Ohio, to the said city of Chattanooga, Tennessee, are required to pay to said C. N. O. & T. P. Ry. Co. by said order of said Commission the following amounts of their private property for said transportation service in the respective classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

and that for the said private property which the parties aggrieved pay to said C. N. O. & T. P. Ry. Co. under said 70 cent schedule of rates, said C. N. O. & T. P. Ry. Co. renders to said parties aggrieved compensation in the way of transportation services in exchange for said private property of said parties aggrieved, only to the extent of said 60 cent schedule of rates, in cents per hundred pounds, as follows:



Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

That said C. N. O. & T. P. Ry. Co. renders said parties aggrieved no compensation for their private property which they are required to pay said C. N. O. & T. P. Ry. Co. for said service on said respective classes, in excess of said 60 cent schedule of rates by the said order of said Commission, and said parties aggrieved are thus 24 deprived of their private property without just compensation to the amount and extent of the difference between said 70 cent schedule of rates and said 60 cent schedule of rates, in cents per hundred pounds, for said respective classes, as follows:

Classes .....	1	2	3	4	5	6
Differences ....	10	6	13	14	14	7

## V.

(38) Your orators further show that the Louisville & Nashville Railroad Company (herein for brevity called L. & N. R. R. Co.), a corporation under the laws of the State of Kentucky, and the Nashville, Chattanooga and Saint Louis Railway (herein for brevity called N. C. & St. L. Ry.), a corporation under the laws of the State of Tennessee, asked leave to intervene in said case No. 1542 and the Commission granted the request of said roads in this respect, and the said roads were then and there heard without formal pleading.

(39) Your orators further show that at the time of said hearing of said case No. 1542, and since that time, said L. & N. R. R. Co. operated 4365.2 connected miles of railroad in the States of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina between the following points with the following mileages, to-wit:

	MILES.
Louisville, Ky., to Nashville, Tenn.....	185.92
Gallatin, Tenn., to Scottsville, Ky.....	35.92
Hartsville Junc. to Hartsville, Tenn.....	11.36
Louisville, Ky., to Cincinnati, Ohio.....	109.82
East Louisville to South Louisville, Ky.....	4.15
"A" Street Connections to Louisville, Ky.....	.76
Louisville to Pipe Line Ave., Ky.....	3.46
La Grange to Lexington, Ky.....	67.00
Shelbyville to Christiansburg, Ky.....	8.51
Anchorage to Shelbyville, Ky.....	18.58
Shelbyville to Bloomfield, Ky.....	26.72
Covington to Corbin, Ky.....	184.02
Ft. Estill Junc. to Rowland, Ky.....	30.47
Bush Creek to Johnetta, Ky.....	4.85
Bardstown Junc. to Springfield, Ky.....	37.44
Lebanon Junc., Ky., to Sinks, Ky.....	107.28
Wilton Junc. to Lorena, Ky.....	3.90
Jellico, Tenn., to Halsey, Ky.....	8.11

Maxie to Kensee, Ky.....	1.78
Cumb. & Ohio Jc. to Greensburg, Ky.....	30.90
25 Corbin, Ky., to Norton, Va.....	117.44
Orby to Harrison, Ky.....	17.13
Middlesboro, Ky., to Manring, Tenn.....	8.14
Stony Fork June. to Logmont, Ky.....	6.08
Logmont to Elwood, Ky.....	2.87
Edgefield June., Tenn., to Howell, Ind.....	145.36
Madisonville to Providence Mine, Ky.....	16.10
Memphis June., Ky., to Memphis, Tenn.....	259.13
Leewood to Aulon, Tenn.....	2.46
Clarksville, Tenn., to Gracey, Ky.....	32.00
Hematite to Pond, Tenn.....	30.71
Van Leer to Cumberland Furnace, Tenn.....	6.19
Columbia, Tenn., to Florence, Ala.....	81.13
Sheffield to Tusculumbia, Ala.....	2.63
Iron City to Pinkney, Tenn.....	11.78
Napier June. to Napier, Tenn.....	10.92
Tenn. & Ala. June. to Long Branch, Tenn.....	7.32
Magella to Brickyard, Ala.....	8.02
Winetka to Steinman, Ala.....	3.16
Graces to Bessemer, Ala.....	11.77
Muscoda June. to Muscoda, Ala.....	1.50
Blue Creek June. to Blockton June., Ala.....	27.07
Yolande to Brookwood, Ala.....	8.44
Chamblee to Goethite, Ala.....	3.99
Boyles to Bessemer, Ala.....	15.74
Boyles to Moragne, Ala.....	60.14
Village Springs to Compton, Ala.....	3.32
Palmers to Bradford, Ala.....	4.40
Boyles to Trussville, Ala.....	17.13
Red Gap Junction to Graces, Ala.....	10.26
Tacoa to Gurnee Junction, Ala.....	9.99
Readers to Ferro No. 2, Ala.....	2.30
Vinita to Graves Mine, Ala.....	2.62
Hewitt Junction to Hewitt, Ala.....	0.67
Mattawan. to Deming, Ala.....	1.73
Saxton, Ky., to Jellico, Tenn.....	3.19
Valley Creek to Virginia, Ala.....	2.05
No. Ala. June. to Searles, Ala.....	3.32
Black Creek to Praco, Ala.....	29.12
Ridgeland to Arcadia, Ala.....	1.32
Mineral Springs to Dunn, Ala.....	1.08
Mineral Springs to Rilma, Ala.....	2.30
Crocker June. to Durant, Ala.....	2.59
Udora to Erskine, Ala.....	0.73
Chetopa to Banner, Ala.....	4.02
26 Vulcan to Sayre Mines, Ala.....	1.69
Altoona to Schuler, Ala.....	1.14
Doleito June. to Doleito, Ala.....	0.98
Dixiana June. to Dixiana, Ala.....	0.52

Connellsville June. to Connellsville, Ala.....	1.77
Abernaut to Rock Castle, Ala.....	1.59
Caffee June. to Martaban, Ala.....	1.03
Spring Gap No. 1 to Skyhy, Ala.....	1.60
Attalla to Calera, Ala.....	119.07
Shelby to Columbiana, Ala.....	5.84
Gilmore Switch to Gantt's Quarry, Ala.....	1.72
O'Connor June. to Buek, Ala.....	2.90
Wewoka June. to Wewoka, Ala.....	1.37
Rockspring to Leba, Ala.....	1.65
Prattville June. to Prattville, Ala.....	10.35
Montgomery to Mobile, Ala.....	177.67
Georgiana, Ala., to Graceville, Fla.....	100.38
Duvall, Ala., to Paxton, Fla.....	23.48
McPhail, Ala., to Lakewood, Fla.....	2.80
Mobile, Ala., to New Orleans, La.....	140.54
Selma to Escambia Junction, Ala.....	111.09
Camden Junction to Camden, Ala.....	16.55
Selma to Myrtlewood, Ala.....	60.25
Flomaton, Ala., to Pensacola, Fla.....	44.64
Pensacola to River Junction, Fla.....	160.47
Corbin, Ky., to Etowah, Tenn.....	162.66
Holton to Hyde, Tenn.....	2.21
Ilford to Westbourne, Tenn.....	2.93
Dossett to Khotan, Tenn.....	12.24
Khotan to Windrock, Tenn.....	0.72
Etowah, Tenn., to Junta, Ga.....	89.38
Etowah, Tenn., — Marietta, Ga.....	142.57
Armona to Marysville, Tenn.....	3.86
Mentor to Greenback, Tenn.....	17.76
Greenback to Jena, Tenn.....	1.14
Murphy June., Ga., to Murphy, N. C.....	23.41
Crestview to Florala, Fla.....	26.40
Gurley June. to Lehigh No. 2, Ala.....	7.90
Owensboro to Adairville, Ky.....	83.46
Penrod to Mud River, Ky.....	4.64
Stouts M'n June. to Stouts Mountain, Ala.....	5.91
Bay Minette to Foley, Ala.....	36.52
Providence to Morganfield, Ky.....	25.33
Pontchartrain June. to Milledgeburg, La.....	4.96
Maysville to Paris, Ky.....	49.48
27    Paris to Lexington, Ky.....	17.86
Yingling to Chadman, Ky.....	2.14
Swan Creek June. to Fancette, Tenn.....	17.10
Evansville, Ind., to East St. Louis, Ill.....	160.96
McLeansboro June. to Shawneetown, Ill.....	40.70
O'Fallon June. to O'Fallon, Ill.....	6.04
Nashville, Tenn., to M.-C. June., Ala.....	118.98
Decatur to Montgomery, Ala.....	182.67
Elmore to Wetumpka, Ala.....	6.30
Fedora to Indio, Ala.....	2.95

Hodgeland June. to El Vista, Ala.....	0.98
Helena to Acton, Ala.....	7.60
Glasgow Junction to Glasgow, Ky.....	10.50
Elkton to Guthrie, Ky.....	10.92
Track in Nashville, Tenn.....	1.15
Hyde, Tenn., to Fonde, Ky.....	11.21
M. & C. Junction to Decatur, Ala.....	1.69
Furnace June. to Sheffield, Ala.....	2.86
Gurnee Jc. to Blockton, Ala.....	14.30
Aden to Masena, Ala.....	3.83
Seymour, Ala., to end of track.....	3.91
Ardella to Hansell, Ala.....	2.90
Wellington, Ala., to Cartersville, Ga.....	77.40
Blockton June. to Blockton, Ala.....	7.73
Track at Norton, Va.....	0.77
Apalachia to Big Stone Gap Furnace, Va.....	3.77
Aulon to South Memphis, Tenn.....	5.46
Morgane to Attalla, Ala.....	1.89
Track at Gadsden, Ala.....	0.43
Junta to Atlanta, Ga.....	48.09
Track at East St. Louis, Ill.....	0.11
Track at Cincinnati, Ohio.....	0.61
Relay Depot, East St. Louis, Ill., to Union Station, St. Louis, Mo.....	3.84
Track at River Junction, Fla.....	0.94
Tracks at Selma, Ala.....	0.87
Cent. Un. Dep., Cin'ti. O., to Covington, Ky.....	2.18
Track at Lexington, Ky.....	0.20
Track at Providence, Ky.....	0.30
Pipe Line Ave. to Prospect, Ky.....	7.70
Track at Lexington, Ky.....	0.22
Track at Owensboro, Ky.....	0.26
Total .....	4,365.20

28 Your orators further show that the above lines of road operated by said L. & N. R. R. Co. are shown and set forth in heavy red lines on the drawing hereto attached marked Exhibit "B" and made a part hereof.

(40) Your orators further show that at the time of said hearing of said case No. 1542, and since said time, said N. C. & St. L. Ry. operated 1230.05 connected miles of railroad in the States of Kentucky, Tennessee, Alabama and Georgia between the following points with the following mileages, to-wit:

	MILES.
Chattanooga, Tenn., to Hickman, Ky.....	320.21
Wartrace, Tenn., to Shelbyville, Tenn.....	8.01
Bridgeport, Ala., to Pikeville, Tenn.....	68.10
Decherd to Columbia, Tenn.....	86.35
Elora, Tenn., via Huntsville, Ala., to Tenn. River.....	
Guntersville to Gadsden, Ala.....	80.08

Tullahoma to Clifty, Tenn.....	84.60
Cowan, Tenn, to Coalmont, Tenn.....	31.17
Nashville, Tenn., to Lebanon, Tenn.....	29.21
Dickson, Tenn., to Allens Creek, Tenn.....	69.91
Kingston to Rome, Ga.....	18.15
Nashville, Tenn., to West Nashville, Tenn.....	6.26
Fayetteville, Tenn., to Lax, Ala.....	36.98
Atlanta, Ga., to Chattanooga, Tenn.....	136.82
Paducah, Ky., to Memphis, Tenn.....	254.20
Total .....	1,230.05

Your orators further show that the above lines of road operated by said N. C. & St. L. Ry. are shown and set forth in the heavy yellow lines with numerous short lines crossing same on the drawing hereto attached marked Exhibit "B" and made a part hereof.

(41) Your orators further show that the single trunk line railroad of the C. N. O. & T. P. Ry. Co., which is 336 miles long and which has no branches and extends from the said City of Cincinnati, Ohio, to said City of Chattanooga, Tenn., is shown by a single heavy blue line with numerous short lines crossing same on said drawing hereto attached and marked Exhibit "B" and made a part hereof.

(42) Your orators further show that the distance from said City of Cincinnati, Ohio, to the said City of Chattanooga, Tenn., via the main line of the L. & N. R. R. Co., from Cincinnati, Ohio, to Louisville, Ky., and the main line of the L. & N. R. R. Co., from Louisville, Ky., to Nashville, Tenn., and over the main line of the

29 N. C. & St. L. Ry. from Nashville, Tenn., to Chattanooga, Tenn., is 450.9 miles, made up as follows:

	MILES.
L. & N. R. R. Co., Cincinnati, Ohio, to Louisville, Ky.....	114.
L. & N. R. R. Co., Louisville, Ky., to Nashville, Tenn.....	185.9
N. C. & St. L. Ry., Nashville, Tenn., to Chattanooga, Tenn..	151.
Total .....	450.9

That the average gross earnings per mile over the said route between said City of Cincinnati, Ohio, and the said City of Chattanooga, Tenn., in the year of 1907, was \$25,593.40.

(43) Your orators further show that said Commission in said case No. 1542, in its report and findings, which said report and findings are made a part of said order in said case found that the Cincinnati Southern Railroad is a single trunk line without branches running from Cincinnati, Ohio, to Chattanooga, Tenn.; that the main line of the L. & N. R. R. Co. extends from Cincinnati, Ohio, to Louisville, Ky., and from Louisville, Ky., to Nashville, Tenn.; that traffic from Louisville, Ky., to Chattanooga, Tennessee, passes through Nashville, Tenn., over the N. C. & St. L. Ry.; that for the year 1907 the gross earnings of the Cincinnati Southern Railroad were over \$26,000 per mile; that for the year 1907 the gross earnings of the L. & N. R. R. Co. were about \$11,000 per mile; that

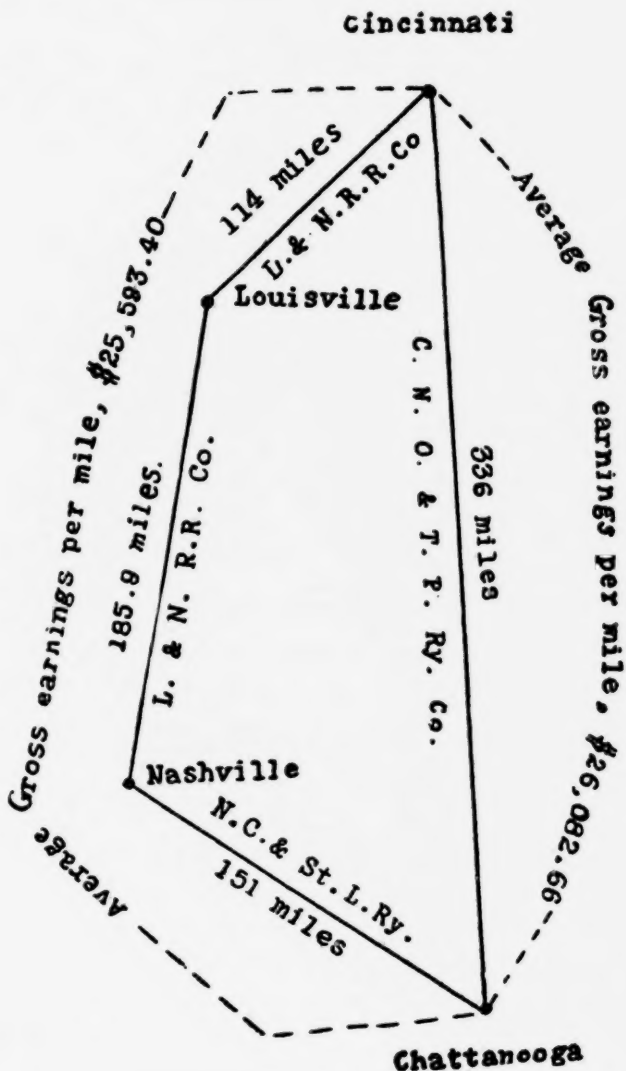
for the year 1907 the gross earnings of the N. C. & St. L. Ry. were \$10,000 per mile; that for the year 1907 the gross earnings of that portion of the line of the L. & N. R. R. Co. between Cincinnati, Ohio, and Louisville, Ky., were \$25,000 per mile; that for the year 1907 the gross earnings for that portion of the L. & N. R. R. Co. between Louisville, Ky., and Nashville, Tenn., were \$30,000 per mile; that for the year 1907 the gross earnings of the N. C. & St. L. Ry. between Hickman, Ky., and Chattanooga, Tenn.—a distance of 320 miles—were over \$20,000 per mile.

Your orators further show that the Commission in making said findings did so in language as follows:

“The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville and Nashville extends from Cincinnati to Louisville and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis, between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile.” (18 I. C. C. Rep., p. 465.)

(44) Your orators further show that the average gross earnings per mile from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of the L. & N. R. R. Co., from Cincinnati, Ohio, to Louisville, Kentucky, and from Louisville, Kentucky, to Nashville, Tennessee, thence over that portion of the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, for the year 1907, was \$25,593.40; that the distance by said route from Cincinnati, Ohio, to Chattanooga, Tennessee, through Louisville and Nashville as above set forth, is 450.9 —.

That the gross earnings per mile of the C. N. O. & T. P. Ry. Co. on its line from Cincinnati, Ohio, to Chattanooga, Tennessee, for the year 1907, was \$26,082.66, and that the distance from Cincinnati, Ohio, to Chattanooga, Tennessee, over the line of the C. N. & O. T. P. Ry. Co., as above set forth, is 336 miles, which said routes, said gross earnings per mile and said mileages are now herein shown as follows:



(45) Your orators further show that the net income per annum of said L. & N. R. R. Co. for the years 1903 to 1907, both inclusive, after deducting operating expenses (including maintenance), fixed charges, interest, rent, taxes and sinking fund payment, was



1903 .....	\$6,211,047
1904 .....	6,668,171
1905 .....	6,827,039
1906 .....	6,348,374
1907 .....	6,450,521

The above figures were a part of the record in said case No. 1542, but the net income of the said L. & N. R. R. Co. for the year 1908 was not in the record.

Your orators further show that the capital stock representing the balance of the property employed in and devoted to public service and use and for the public convenience not compensated under items of said fixed charges, interest, rents and sinking fund payment of the said L. & N. R. R. Co., for the years 1903 to 1907, both inclusive, was as follows:

1903 .....	\$60,000,000
1904 .....	60,000,000
1905 .....	60,000,000
1906 .....	60,000,000
1907 .....	60,000,000

Your orators further show that the respective amounts shown as net income per annum for the years 1903 to 1907, both inclusive, would produce a percentage return on the said amount of capital stock for said years, as follows:

*Percentage Return on Capital Stock.*

	Per cent.
1903 .....	10.35
1904 .....	11.11
1905 .....	11.38
1906 .....	10.58
1907 .....	10.75

Your orators further show that items above referred to for the year 1908 were not in the record in said case No. 1542.

(45a) Your orators further show that the sums mentioned below were credited to the Profit and Loss Account of said L. & N. R. R. Co. for the years ending June 30, 1903, to 1908, inclusive:

Balance to the credit of Profit and Loss Account, June 30, 1903.....	\$8,292,710.22
33 Balance to the credit of Profit and Loss Ac- count, June 30, 1904.....	11,684,424.12
Balance to the credit of Profit and Loss Account, June 30, 1905 .....	14,899,106.26
Balance to the credit of Profit and Loss Account, June 30, 1906 .....	18,130,045.82
Balance to the credit of Profit and Loss Account, June 30, 1907 .....	20,827,512.88
Balance to the credit of Profit and Loss Account, June 30, 1908 .....	19,015,000.15

(45b) Your orators further show that in the year 1881 said L. & N. R. R. Co. declared a stock dividend to its stockholders of 100 per cent.

(45c) Your orators further show that the result of the operations of the L. & N. R. R. Co. for the year ending June 30th, 1910, are substantially are as follows:

Gross earnings.....	\$52,411,000
Expenses and taxes.....	36,011,000
Net .....	16,400,000
Other income.....	1,625,000
Total income.....	18,025,000
Charges .....	8,000,000
Surplus .....	10,025,000

that the surplus of \$10,025,000 is equivalent to 16.7 per cent. on said \$60,000,000 capital stock, as set forth in paragraph (45) hereof.

(46) Your orators further show that the schedule of rates complained of in said case No. 1542, from Cincinnati, Ohio, to Chattanooga, Tennessee, was said 76 cent schedule in effect over said Cincinnati Southern Railway, a single trunk line without branches, running from Cincinnati, Ohio, to Chattanooga, Tennessee, as an unjust and unreasonable schedule of rates as in and of itself; and that said complaint in said case No. 1542 was not a complaint against an unjust and unreasonable individual rate, nor a complaint against an unjust and unreasonable specific rate on a given article; but that said complaint in said case No. 1542 was a complaint against said 76 cent schedule of rates maintained by said Cincinnati Southern Railway, operated by said C. N. O. & T. P. Ry. Co., taken by itself as a single trunk line without branches running from Cincinnati, Ohio, to Chattanooga, Tennessee.

34 Your orators further show that said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry., or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, Kentucky, thence over the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee; that said complaint in said case No. 1542 was not a complaint as to any schedule of rates, joint rates or through rates, maintained by the said L. & N. R. R. Co. on its division, extending from Mobile, Alabama, to New Orleans, La., nor any of its numerous divisions or branches; that said complaint in said case No. 1542 was not a complaint as to any of the rates or schedules of rates joint rates or through rates maintained by said N. C. & St. L. Ry. on its division between Paducah, Kentucky, and Memphis, Tennessee, nor on any of its numerous divisions or branches.

Your orators further show that the complaint in said case No. 1542 was not directed against the return on the value of the property employed in and devoted to the public use and service and for

the public convenience by said L. & N. R. R. Co. or said N. C. & St. L. Ry. or both of them.

(47) Your orators further show that although said complaint in said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry. or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, as more particularly set forth in paragraph (46) of this Bill of Complaint; yet said Commission tried case No. 1542 as if said Commission was called upon in said case No. 1542 to adjust the rates on the entire lines (including main line and branches) of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

Said Commission in adjusting the schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. in its report in said case No. 1542, used language as follows:

"Now, in adjusting the rates of the Louisville and Nashville or the Nashville, Chattanooga and St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?"

"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in  
35 a degree contribute to the support of the branch line for the branch-line business when it reaches the main line is surplus traffic from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates up on the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it." (18 L. C. C. Rep., p. 465.)

Your orators further show that said Commission in adjusting the schedules of rates of said L. & N. R. R. Co. and said N. C. & St. L. Ry. in said case No. 1542, although the schedules of rates of said two companies were not complained of, nor were the schedules of rates of said two companies at issue in said case No. 1542, took into consideration the entire main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., the gross earnings per mile for 1907 of the L. & N. R. R. Co. being about \$11,000, and for the same year the gross earnings per mile of the N. C. & St. L. Ry. being less than \$10,000, and determined that said 70 cent schedule of rates should be a schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of said L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, thence by the main line to the said N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, a distance of 450.9 miles; and having thus adjusted a schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, thereupon determined and prescribed the said 70 cent schedule of rates as a schedule of rates to be maintained by the said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, over its single trunk line without branches, 336 miles in length, although the gross earnings per mile of the said C. N. O. & T. P. Ry. Co. for the year 1907 exceeded \$26,000; that said Commission

by its order in said case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, based upon a schedule of rates adjusted for the main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., when said 70 cent schedule of rates thus adjusted for the said L. & N. R. R. Co. and said N. C. & St. L.

36 Ry. if applied to and prescribed for the single trunk line railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, operated by said C. N. O. & T. P. Ry. Co., would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C. N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience, arbitrarily, oppressively, unconstitutionally, unlawfully and by mere fiat, deprive said parties aggrieved of their property without due process of law in the manner more particularly set forth in paragraph (36) of this Bill of Complaint; and deprive said parties aggrieved of their private property without just compensation in the manner more particularly set forth in paragraph (37) of this Bill of Complaint.

(48) Your orators further show that said Commission in its report in said case No. 1542 laid down the following rule:

"In the Matter of Proposed Advances in Freight Rates, 9 I. C. C. Rep., 382, the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the Spokane case, 15 I. C. C. Rep., 376, the same subject was considered and the same conclusion reached. The last affirmation of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.*, 15 I. C. C. Rep., 555, in which the rule is stated by Clark, Commissioner, as follows:

"In the Spokane case, 15 I. C. C. Rep., 376, we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

"As before suggested, we cannot, in determining competitive rates, select that railroad which is the shortest or most advantageously situated, and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines."

"We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits." (18 I. C. C. R. 464.)

37 Your orators further show that as above set forth in paragraph (44) the average gross earnings per mile of the route from Cincinnati, Ohio, to Chattanooga, Tennessee, via the L. & N. R. R. Co. and the N. C. & St. L. Ry. through Louisville and Nashville is approximately the same as the gross earnings per mile of the direct

line from Cincinnati, Ohio, to Chattanooga, Tennessee, via the C. N. O. & T. P. Ry. Co., and that therefore, applying the above rule within its proper limits, the said two routes from Cincinnati, Ohio, to Chattanooga, Tennessee, should be treated as equal.

Your orators further show that said Commission in its report in said case No. 1542, failed to apply said rule within its proper limits, but as more particularly set forth in paragraph (47) of this Bill of Complaint, said Commission instead of limiting its consideration to the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, and the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, considered the entire lines, including main line and branches, of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

(49) Your orators further show that in said case No. 1542 no complaint was made against the unjustness nor unreasonableness of the schedule of rates from Louisville, Kentucky, to Chattanooga, Tennessee; nor of the unjustness nor the unreasonableness of the schedule of rates from other Ohio River crossings to Chattanooga, Tennessee; nor of the unjustness nor unreasonableness of the schedule of rates from Memphis, Tennessee, to Chattanooga, Tennessee; nor of the unjustness nor unreasonableness of the schedule of rates from Memphis, Tennessee, to Birmingham, Alabama; nor of the unjustness nor unreasonableness of the schedule of rates from the Ohio River to Atlanta, Georgia; nor of the unjustness nor unreasonableness of the schedule of rates from the east to Atlanta, Georgia; that notwithstanding there was no complaint against the schedules of rates as described above in this paragraph, and notwithstanding none of said described schedules of rates were at issue in said case No. 1542, said Commission arbitrarily tried said case No. 1542 as if the said schedules of rates as described above in this paragraph were complained of as being unjust and unreasonable; that said Commission in its report of said case No. 1542 used the following language with reference to the schedules of rates as described above in this paragraph:

38 "In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga

without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis and San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a re-opening of that contest.

"It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory." (18 L. C. C. R. 462-463.)

Your orators further shew that said Commission in its report in said case No. 1542 used language as follows:

"In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think some slight reductions should be made in the rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory." (18 L. C. C. R. 466 and 467.)

Your orators further show that said commission by its order in said Case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, based upon the numerous schedules of rates above described in this paragraph, which said 70 cent schedule of rates if applied to and prescribed for the single trunk line railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, operated by said C. N. O. & T. P. Ry. Co., would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C. N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience, arbitrarily, oppressively, unconstitutionally, unlawfully, and by mere fiat, deprive said parties aggrieved of their prop-

erty without due process of law in the manner more particularly set forth in paragraph (36) of this Bill of Complaint, and deprive said parties aggrieved of their private property without just compensation in the manner more particularly set forth in paragraph (37) of this Bill of Complaint.

(50) Your orators further show that when the parties aggrieved tender to said C. N. O. & T. P. Ry. Co. shipments of goods, wares, and merchandise under Classes 1, 2, 3, 4, 5 and 6, respectively, for transportation over single trunk line without branches of said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, said parties aggrieved are entitled to have their said shipments of goods, wares and merchandise transported by said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, at freight rates no higher than will yield to said C. N. O. & T. P. Ry. Co. a reasonable return on the fair value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public

40 service and use and for the public convenience; your orators further show that the value of the property of the L. & N. R. R. Co. Co. and the N. C. & St. L. Ry. employed in and devoted to the public service and use and for the public convenience, and the schedule of rates from Memphis, Tennessee, to Chattanooga, Tennessee, and the schedule of rates from Memphis, Tennessee, to Birmingham, Alabama, and the schedule of rates from the east to Atlanta, Georgia, should not arbitrarily and by mere fiat control the question as to what schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, will yield to said C. N. O. & T. P. Ry. Co. a reasonable return upon the fair value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use and for the public convenience

(51) Your orators further show that under the facts set forth in this Bill of Complaint, the undisputed facts in said case No. 1542, the grounds of complaint in said case No. 1542, findings of fact by said Commission in said case No. 1542, and the things which were complained of in said case No. 1542, and the things which were not complained of in said case No. 1542 as more particularly specified in paragraph (46) of this Bill of Complaint, that said Commission have given no reasons or rules of law why said C. N. O. & T. P. Ry. Co. should not be taken by itself, and no reasons why the property of the parties aggrieved should be taken without due process of law and why the private property of the parties aggrieved should be taken for public use without just compensation.

Your orators further show that in view of the uncontradicted fact that said 60 cent schedule of rates would make more than due returns to said C. N. O. & T. P. Ry. Co., to-wit, 40.66 per cent. per annum, on the value of its property devoted to and employed in the public service and use and for the public convenience, that said Commission in violation of the limitations placed upon the exercise of its power, has required all shippers, including the parties aggrieved, to pay excessive freight rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the Cincinnati Southern merely for the purpose of enabling some other road to make profits, and to enable some other



road to maintain branches and to enable some other road to diffuse population and industries.

(52) Your orators further show that in said case No. 154 complaint was made to said Commission that said 76 cent schedule of rates from Cincinnati, Ohio, to Chattanooga maintained

41 by said Cincinnati Southern Railway a single trunk line with two termini and without branches, was unjust and unreasonable in and of itself; that two questions were thereby presented to said Commission, the first whether said 76 cent schedule of rates complained of produced an undue profit on the value of the property devoted to and employed in the public service and use and for the public convenience; and the second for said Commission to substitute for, in lieu of and in place of said 76 cent schedule of rates a new schedule of rates that would return to said C. N. O. & T. P. Ry. Co. so operating said single trunk line without branches between said two termini a fair and reasonable profit upon the value of its property devoted to and employed in the public service and use and for the public convenience and not in excess thereof.

Your orators further show that the correct rules of law as applicable thereto were as follows:

(a) That where a schedule of rates between two termini of a single trunk line without branches yields to the Railway Company operating said single trunk line without branches, excessive net profits on the value of its property devoted to and employed in the public service and use, and for the public convenience, that such schedule of rates is unjust and unreasonable in and of itself, and that the enforcement of such rates to the amount of said excess is the taking of property without due process of law and the taking of private property for the public use without just compensation; and on complaint filed with the Interstate Commerce Commission it is the duty of said Commission to apply said rule of law.

(b) That where such complaint has been sustained by the Interstate Commerce Commission that a schedule of rates between the two termini of a single trunk line without branches is unjust and unreasonable in and of itself and returns an excessive net profit on the value of the property devoted to and employed in the public service and use and for the public convenience, it is a rule of law that the Interstate Commerce Commission shall prescribe a new schedule of rates which will yield a fair net profit to the Railway Company operating said trunk line with two termini without branches, upon the fair value of its property devoted to and employed in the public service and use and for the public convenience and not in excess thereof.

(c) That said Interstate Commerce Commission in prescribing such new schedule of rates is without power, and acts beyond the limitations upon its powers if it prescribes a new schedule of rates which will yield to said Railway  
42 Company operating said single trunk line with two termini without branches a profit in excess of a reasonable net profit on the fair value of the property devoted to and

employed in the public service and use, and for the public convenience; and said Commission is without power in prescribing such new schedule of rates which will yield the said Railway Company operating a single trunk line with two termini without branches a profit in excess of a reasonable net profit on the fair value of the property devoted to and employed in the public service and use and for the public convenience and has no power so to do on the grounds that said Commission will thereby enable some other road to make profits and to enable some other road to maintain branches and to enable some other road to diffuse population and industries.

(d) That said Interstate Commerce Commission in determining what new schedule of rates will produce a reasonable net profit to the complained-of Railway Company operating a single trunk line with two termini without branches on the fair value of the property devoted to and employed in the public service and use and for the public convenience, may consider as evidentiary facts bearing thereon schedules of rates on other roads operated under substantially similar circumstances and conditions, but said schedules of rates on said other roads are merely evidentiary facts, and are not to be given controlling and decisive influence, and such schedules of rates on such other roads are not to be prescribed for the complained of Railway Company for the purpose of enabling such other roads to make profits or to enable such other roads to maintain branches or to enable such other roads to diffuse population and industries.

(53) Your orators further show that said Commission failed and refused to apply said rules of law and on the contrary in determining what would be a schedule of rates for said C. N. O. & T. P. Ry. Co. between said two termini of said Cincinnati Southern Railway, a single trunk line without branches, fixed rates to make profits for said L. & N. R. R. Co. and said N. C. & St. L. Ry. and to enable them and each of them to maintain branch lines and to enable them and each of them to diffuse population and industries.

(54) Your orators further show that said Commission acted in violation of the limitations imposed by the Constitution of the United States, particularly the limitations imposed by Article 5 of the Amendments to the Constitution of the United States, and acted

beyond its delegated powers and evidenced such unreasonable exercise of its powers as to be substantially without and beyond such powers and considered matter as the fact to be proved, which were mere evidentiary facts and considered as evidence that which under the proper rules of law was no evidence whatsoever; and arbitrarily and by mere fiat refused to prescribe said 60 cent schedule of rates and applied erroneous rules of law, all as appears from said Exhibit "A" hereto attached and made a part hereof, and to which particular attention is now called.

(a) Said Commission gave as a reason for not prescribing said 60 cent schedule of rates that the rates from Cincinnati to Chattanooga and Louisville to Chattanooga had been the same for the last twenty-eight years; that the distance is substantially the same, and that said relation in rates would undoubtedly be maintained in the future; that the language of said Commission was as follows:

"The rate from Cincinnati and Louisville to Chattanooga has been the same for the last twenty-eight years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future." (18 I. C. C. R., 462.)

Your orators further show that said C. N. O. & T. P. Ry. Co. has no vested right in a particular schedule of rates, and that said parties aggrieved should not be barred by lapse of time from having substituted a 60 cent schedule of rates in place of a 76 cent schedule of rates, which latter schedule of rates has been condemned by the Commission as unjust and unreasonable in said case No. 1542.

Your orators further show that the shippers of Cincinnati, including said parties aggrieved, have a right to any and all natural advantages that they may have in the existence and location of said Cincinnati Southern Railway, a single trunk line with two termini and no branches extending from Cincinnati, Ohio, to Chattanooga, Tennessee, and that it is beyond the powers of said Commission to take away said natural advantages.

Your orators further show that said shippers including said parties aggrieved, should not be deprived of said 60 cent schedule of rates because shippers in Louisville may or may not on complaint filed have a right to compel the L. & N. R. R. Co. and its connecting carrier, the N. C. & St. L. Ry., to maintain through or joint rates from the City of Louisville, Kentucky, to the City of Chattanooga, Tennessee, and that the conjecture of the Commission that this relation in rates will undoubtedly be maintained is no reason for depriving

44 said shippers of Cincinnati, Ohio, including said parties aggrieved, from a just and reasonable rate from Cincinnati,

Ohio, to Chattanooga, Tennessee, over the Cincinnati Southern Railway, considering the value of the property of the C. N. O. & T. P. Ry. devoted to and employed in the public service and use, and for the public convenience.

(b) Said Commission gave as a reason for not prescribing said 60 cent schedule of rates, that whatever reduction might be made from Cincinnati will be met by corresponding reductions from other Ohio River crossings; that rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and that this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati; that the language of said Commission was as follows:

"Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and this relation will undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati." (18 I. C. C. R., 462.)

Your orators further show that shippers of Cincinnati, including said parties aggrieved, have a right to any and all natural advantages that they may have in the existence and location of said Cincinnati Southern Railway, a single trunk line with two termini and no branches, extending from Cincinnati, Ohio,

to Chattanooga, Tennessee, and that it is beyond the power of said Commission to take away said natural advantages merely because other roads at other Ohio River crossings may have to make corresponding reductions in order to preserve their present relations, there being no facts in the record in said case No. 1542 to show or tending to show that by so doing the said other roads would not earn a fair return on the value of their property devoted to and employed in the public service and use, and for the public convenience.

(c) Said Commission gave as a reason for not prescribing said 60 cent schedule of rates that said Commission in the original cases, to-wit, Nos. 322 and 323, ordered reductions to many other points besides Chattanooga; that while Chattanooga is the only Southern point of destination referred to in the complaint in case No. 1542, that it was frankly stated that the purpose was to obtain a general reduction in the Southeastern territory; that no reason was apparent why if the Commission adhered to its former decision in the case of Chattanooga, it ought not to do the same in the case of other localities in said territory; that it was to be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reductions to Chattanooga; that originally the same rate had been made to Atlanta from Louisville as was made from Baltimore; that after the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and that the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile although the distance was shorter; that at the present time the rate per mile is greater in the case of Chattanooga than in the case of Atlanta; that defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time for the following reasons:

That the reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the North were too high in comparison with Birmingham and Montgomery; that by that re-adjustment Atlanta was made the same as Montgomery, and the difference between Atlanta and Birmingham reduced. Your orators further show that said Commission then continued as its reason that the distance from Memphis to Birmingham is 251 miles and that the distance from Memphis to Chattanooga is 300 miles; that the distance from Cincinnati to Chattanooga is 336 miles; that the rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati in recognition of the shorter distance and that the St. Louis and San Francisco Railway insists that the rates from Memphis to Birmingham should not materially exceed the rate from Memphis to Chattanooga; that this seems reasonable in view of the fact that the distance is fifty miles shorter; that if at the time of said case No. 1542 this rate from Cincinnati to Chattanooga is reduced that it will in all probability carry with it a reduction from Memphis to Chattanooga, and that this will involve a corresponding reduction from Memphis to Birmingham, and that this will create the same dis-

crimination out of which the reduction of 1905 came; that this would mean a re-opening of said contest; that it should be remembered that any reduction from the North to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East, as was the case in 1905; that it is apparent to make any considerable change in the rate from Cincinnati to Chattanooga will work a lowering in rates throughout the entire Southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory; that the language of said Commission was as follows:

46 "In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rule was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time for the following reasons:

"The reduction of 1905 grew out of the claim upon the part of Atlanta that its rates from the North were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis and San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is fifty miles shorter. If now, this rate from Cincinnati to Chattanooga is reduced, 47 that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the North

Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East, as was the case in 1905. "It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory." (18 I. C. C. R., 62-463.)

Your orators further show that the shippers of Cincinnati, including said parties aggrieved, should not be deprived of a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, that would yield said C. N. O. & T. P. Ry. Co. more than a reasonable return upon the value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use, and for the public convenience, because said Commission finds no apparent reason why if it adhered to its former decision as to the rates from Cincinnati, Ohio, to Chattanooga, Tennessee, why it ought not to do the same in the case of other localities in said territory; that the shippers of Cincinnati, including the parties aggrieved, are entitled to a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, that will not yield to said C. N. O. & T. P. Ry. Co. more than a reasonable return upon the fair value of the property the C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use and for the public convenience, even though the establishment of such a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, makes it necessary for the Commission to prescribe lower just and reasonable rates than now in effect to other points in the southern territory south of Chattanooga, Tennessee.

Your orators further show that the shippers of Cincinnati, including the parties aggrieved should not be denied justice because the Commission might be called upon to render justice to communities in the South other than Chattanooga, Tennessee.

48 Your orators further show that the shippers of Cincinnati, including the parties aggrieved, should not be deprived of said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, because of the conjecture on the part of the Commission that there might be a corresponding reduction made in the rates from Memphis, Tennessee, to Chattanooga, Tennessee, and in the rates from Memphis, Tennessee, to Birmingham, Alabama.

Your orators further show that the shippers of Cincinnati, including the parties aggrieved, are entitled to a just and reasonable schedule of rates over the Cincinnati Southern Railway taken by itself, and should not be deprived of said 60 cent schedule of rates because of the conjecture of the Commission that if said 60 cent schedule of rates was established from Cincinnati, Ohio, to Chattanooga, Tennessee, might cause a reduction in the rates from Cincinnati, Ohio, to Atlanta, Georgia, which said reduction from Cincinnati, Ohio, to Atlanta, Georgia, might be

followed by a reduction in the rates from the East to Atlanta, Georgia.

Your orators further show that the shippers of Cincinnati, including the parties aggrieved, should not be deprived of said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, because of the conjecture of the Commission that to make any considerable change in the rates from Cincinnati, Ohio, to Chattanooga, Tennessee, will work a lowering in rates throughout the entire southern territory, or produce a change in the relation of rates; that had the Commission prescribed said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, and had thus as conjectured, produced change in the relation of rates in the southern territory, then on complaint made said Commission has power to fix just and reasonable rates, and the complainants in said case No. 1542 and the parties aggrieved, should not be deprived of justice because of any inconvenience to the Commission in hearing just complaints.

Your orators further show that the shippers of Cincinnati, including the parties aggrieved, should not be done an injustice and be deprived of said 60 cent schedule of rates because some other common carriers subject to the act to regulate commerce and whose lines do not reach either Cincinnati, Ohio, or Chattanooga, Tennessee, might not make a change in the relation of rates to correspond with said 60 cent schedule of rates, provided said 60 cent  
49 schedule of rates was established from Cincinnati, Ohio, to Chattanooga Tennessee.

(54a) Your orators further show that there was no evidence in said case No. 1542 to show or tending to show, or facts within the cognizance of said Commission, nor did the Commission in its report in said case make any finding, that had the C. N. O. & T. P. Ry. Co. been ordered to establish and maintain said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, and because thereof other carriers correspondingly lowered their rates as conjectured by the Commission, that the said conjectured lower rates would have yielded said other carriers less than a reasonable return upon the fair value of the property which said other carriers employ in and devote to the public service and use and for the public convenience.

(54b) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the Railroad Commissions of most States in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances." (18 I. C. C. R., 466.)

Your orators further show that the above is no sufficient reason to arbitrarily and by mere fiat deprive the shippers of Cincinnati, including the parties aggrieved, of their property and just rights for the reason the said roads in the South, with rare exceptions, are not single trunk lines between two termini without branches, but



on the contrary, said roads, with rare exceptions, consist of main lines, with numerous branches, and the gross earnings per mile on said roads, with rare exceptions, are less than the net earnings per mile of the said Cincinnati Southern Railway, shown in paragraph (20) hereof, a single trunk line road with but two termini and no branches; that the circumstances and conditions under which they are operated are totally dissimilar from those under which the Cincinnati Southern Railroad is operated.

(55) Your orators further show that the said Commission in its report in said case No. 1542 laid down the following:

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans and Texas Pacific in the year 1907 over two-thirds of the tonnage was delivered to it by its connections, the most of it hauled as a through transaction from Cincinnati to Chattanooga, or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn into this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the City of Cincinnati were operating this property itself it is by no means certain that the apparently undue profit of today might not be a deficit." (18 I. C. C. R., 465.)

Your orators further show said Commission in said case No. 1542 held and found as a matter of fact that said C. N. O. & T. P. Ry. Co. and "its operation is in fact entirely distinct from that of the Southern Railway" (18 I. C. C. R., 457); that said Commission also held and found as a matter of fact that "the officers of the Southern Railway have no control whatever over those of the Cincinnati, New Orleans and Texas Pacific and could not legally dictate the action of the latter company" (18 I. C. C. R., 457); that said Commission also held and found as a matter of fact as to said Cincinnati Southern that "this property to-day is unique among railroads in the South" (18 I. C. C. R., 461); that said Commission also held and found as a matter of fact and as a proper rule to be applied thereto, as follows: "We must under this construction of the law dispose of this case as though these two companies (the C. N. O. & T. P. Ry. Co. and the Southern Railway Co.) were distinct in fact as well as in name and in operation." (18 I. C. C. R., 457.)

Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations of its powers deprived the parties aggrieved of their property and just rights upon the mere conjecture that the prosperity of the C. N. O. & T. P. Ry. Co. might be due to the ability of the Southern Railway to turn into said road traffic; and upon the mere conjecture that the undue profits of said C. N. O. & T. P. Ry. Co. might not exist if the City of Cincinnati operated said Cincinnati Southern Railroad itself.

Your orators further show that said Commission arbitrarily, and by mere fiat, deprived said parties aggrieved of their property and just rights upon mere conjectures of said Commission, although said City of Cincinnati had parted with its right to operate said Cincinnati

51 Cincinnati Southern, and that the matter stood exactly as though said Cincinnati Southern had been built by private capital, said findings of fact by said Commission in said case No. 1542 being in the following language: "However this may be, the City has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital." (18 I. C. C. R., 464.)

(56) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points." (18 I. C. C. R., 464.)

Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers and without legal right and unjustly deprived the parties aggrieved of their property and just rights merely because Chattanooga is not complaining of unfair treatment as compared with other southern points; that the time to deal with that problem will arise when complaints, if any, are made to said Commission by any person injured; that the question of Chattanooga not complaining of unfair treatment as compared with other southern points was not at issue in said case No. 1542, and because not at issue in said case that it was mere exercise of arbitrary power on the part of said Commission to deprive the parties aggrieved of their property, just rights, and adequate remedy.

(57) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"Some indignation was expressed by several witnesses upon the part of the City of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad, that property was not more devoted to the interests of the City of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present, it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer, and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities and the relation of rates would have continued the same. However, this may be, the city has parted with its right to operate this property, and the matter stands exactly as through this road had been built by private capital." (18 I. C. C. Rep., 464.)

Your orators further show that the shippers of Cincinnati including the parties aggrieved are entitled to the benefit of a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, via the Cincinnati Southern, even though when the Commission fixes a just and reasonable

schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, via the Cincinnati Southern, other railroads might also establish just and reasonable schedules of rates between other communities is no reason for depriving the shippers of Cincinnati including the parties aggrieved of the benefit of a just and reasonable schedule of freight rates from Cincinnati, Ohio, to Chattanooga, Tennessee, via the Cincinnati Southern, that will yield no more than a fair profit upon the fair value of the property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and for the public convenience.

(58) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"Cincinnati is 114 miles northeast of Louisville. Previous to the construction of the Cincinnati Southern all business for Chattanooga and the south and southeast passed through Louisville, and the rate was a differential above that from Louisville. Cincinnati was therefore obliged to pay upon all traffic to this its best market a higher transportation charge than its rivals upon the Ohio River. The purpose of constructing the Cincinnati Southern was to obtain a line from Cincinnati to Chattanooga which should be no longer than the line from Louisville, and which would therefore insure to that city the same rate to Chattanooga and all points in the south and southeast reached through that gateway which was enjoyed by Louisville. Immediately upon the opening of the Cincinnati Southern the rate from Cincinnati to Chattanooga was made the same as that from Louisville, and this relation has ever since been maintained; so that the city to-day, in addition to the profit upon its investment of 1½ per cent., secures all the advantages contemplated by the construction of the railroad." (18 I. C. C. Rep., 460-461.)

Your orators further show that Cincinnati shippers, including the parties aggrieved, are entitled to all the benefits accruing from the existence and location of the Cincinnati Southern Railroad, 53 whatever may have been the original purpose in constructing said road, and that it is beyond the power of said Commission and beyond the limitations on the powers of said Commission to deprive the Cincinnati shippers, including the parties aggrieved, from all the benefits of said the Cincinnati Southern Railroad, irrespective of the original purpose of constructing the said Cincinnati Southern Railroad, and that to deprive the shippers of Cincinnati including the parties aggrieved, of all the benefits of the existence and location of the said the Cincinnati Southern Railroad is to arbitrarily, oppressively, unlawfully, unjustly and by mere fiat, deprive the shippers of Cincinnati including the parties aggrieved, of their property and just rights contrary to the Constitution of the United States and the Amendments to the Constitution of the United States, particularly Article 5 of the Amendments to the Constitution of the United States, and contrary to the provisions of said act to regulate Interstate Commerce and the various acts amendatory of and supplemental thereto and of other provisions of other statutes of the United States and is such an unreasonable

exercise in such an unreasonable manner of the powers conferred upon said Commission as not to be within the powers of said Commission and not even within the shadow of the powers conferred on said Commission.

(59) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for lower rates; and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past railways have been able to introduce various economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight one mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices." (18 I. C. C. Rep., 466.)

Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers deprived the parties aggrieved of their property and just rights upon mere conjecture as to what the future might bring about.

(59a) Your orators further show that said Commission, in said case No. 1542, laid down the following:

54 "The testimony shows that in order to handle the business offering, it has been necessary already to expend large sums in the improvement of the roadway and structure, and that further large sums must be expended in the future. This money, say the defendants, can only be obtained from income from operation, and hence a sufficient rate should be allowed to permit the making of these necessary additions.

"This position is not well taken. A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, but it is not entitled to have that property paid for by the public. This Commission has so decided in *Central Yellow Pine Asso. v. I. C. R. R. Co.*, 10 I. C. C. Rep., 505, and the Supreme Court has affirmed the correctness of that holding. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S., 411. If these stockholders have entered upon this enterprise without the means to provide necessary funds with which to carry it on, that can be no reason for the imposition of rates otherwise unreasonable." (18 I. C. C. R., 462.)

Your orators further show that for the six years—1903 to 1908, both inclusive—as more particularly set forth in paragraph (20) hereof, said C. N. O. & T. P. Ry. Co. expended out of earnings for permanent improvements and new rolling stock the sum of \$10,095,637.79, a yearly average of \$1,682,606.30.

Your orators further show that as set forth in paragraph (27a) hereof, had the said 70 cent schedule of rates been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903 to 1908, both inclusive, the annual average net profit of said C. N. O. & T.

P. Ry. Co. would on the same tonnage have been reduced annually by the comparatively trifling sum of \$12,000.

Your orators further show that, although said Commission laid down the sound rule of law as above quoted in this paragraph, to-wit, that said C. N. O. & T. P. Ry. Co. was not entitled to a sufficient rate to permit said company to make additions by way of permanent improvements and pay same out of earnings, yet if the said 70 cent schedule of rates had been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903 to 1908, both inclusive, the Commission, by such order establishing such a schedule of rates, would have authorized and empowered said C. N. O. & T. P. Ry. Co. to take from the public to pay for the additions aforesaid annually the difference between said \$1,682,-

606.30 and said \$12,000, namely, \$1,670,606.30; that said Commission, by its order establishing said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, did

thereby authorize and empower said C. N. O. & T. P. Ry. Co. to take from the public to pay for future additions as aforesaid annually, substantially and approximately said difference between \$1,682,-606.30 and said \$12,000, namely, \$1,670,606.30; that said Commission arbitrarily, oppressively, unjustly, unlawfully and unconstitutionally failed to apply the rule of law as laid down by said Commission; that said Commission thereby acted arbitrarily and merely within the shadow of the powers and duties given to and imposed on said Commission to establish a just and reasonable schedule of rates, but in violation of the substance of said powers and duties given to and imposed on said Commission.

(60) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Company, but also with reference to other companies whose rates are necessarily affected by these; otherwise stated the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company just as it would be the misfortune of some other company if it could not show as favorable earnings." (18 L. C. C. R., 462.)

Your orators further show that said Commission refused to sustain the claims of the defendants in reference to the financial necessities of said C. N. O. & T. P. Ry. Co., but did sustain the contention of the defendants as to the balance of said paragraph.

Your orators further show that said rule as applied by said Commission was an erroneous rule of law and if said Commission had applied the correct rule of law that said Commission would have in no event established a schedule of rates to exceed said 60 cent schedule of rates:

Your orators further show that said Commission thereby arbitra-

rily and by mere fiat and beyond the limitations on its powers deprived the parties aggrieved of their property and just rights.

56 (61) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive. In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think that some slight reduction should be made in these rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory. In the readjustment of 1905 rates to Chattanooga from the Ohio River were not reduced, although those from the east were. We are of the opinion that the present rates are unreasonable, and that rates should be established upon the numbered classes, not exceeding in cents per 100 pounds the following:

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

and it will be so ordered." (18 I. C. C. R., 466-467.)

Your orators further show that in and by said paragraph said Commission was guided by erroneous rules of law; that it was the duty of said Commission to act with cold neutrality in dealing with the undisputed and admitted facts in said case No. 1542; that it was not an issue in said case to make widespread and far-reaching reductions in rates; that the sole question at issue before said Commission in said case No. 1542 was on its findings of fact to declare said 76 cent schedule of rates unjust and unreasonable and on its findings of fact to substitute therefor in no event a schedule of rates to exceed said 60 cent schedule of rates; that it was beyond the power of said Commission to refuse to afford the complainants just and adequate relief in said case No. 1542 by the mere fact that the effect of the introduction of a 60 cent schedule of rates might be far-reaching; that said conclusion of said Commission that said 76 cent schedule of rates of itself was not clearly excessive was in direct contradiction of the finding of fact of said Commission, that said 76 cent schedule of rates was in and of itself unjust and unreasonable; that it was not a sound rule of law for said Commission to make slight reductions in schedules of rates but it is a sound rule of law that said Commission has power to and should substitute a new, just and reasonable schedule of maximum rates, which rule

57 of law the said Commission failed to apply and applied an erroneous rule of law; that said Commission in its said findings failed to find that said 70 cent schedule of rates would be just and reasonable maximum rates and that it was beyond the powers of said Commission to substitute a new schedule of rates without said Commission finding that said new schedule of rates would be just and reasonable.

Your orators further show that said Commission thereby acted

arbitrarily, unlawfully, unjustly and oppressively and beyond its powers and beyond the limitations on its powers and acted by mere fiat and exercised its powers in such an unreasonable manner as not to be within the powers of said Commission and not even within the shadow of the powers conferred on said Commission.

(62) Your orators further show that said Commission in its said report, findings, conclusions, order and requirement in said case No. 1542, wholly failed and omitted to find that said ordered 70 cent schedule of rates was a just schedule of rates, or that said 70 cent schedule of rates was a reasonable schedule of rates, or that said 70 cent schedule of rates was a just and reasonable schedule of rates.

(63) Your orators further show that Section 5 of said Act to regulate commerce provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as afore-said, each day of its continuance shall be deemed a separate offense."

Your orators further show that, although it is unlawful for a common carrier to enter into any contract, agreement or combination with any other competing common carrier or carriers of less financial strength to divide with said competing common carrier or carriers the aggregate or net proceeds of their earnings or any portion thereof, yet the effect of the Commission's finding and the grounds thereof, as more particularly set forth in paragraph (48) hereof, in spirit and in effect, is a pooling of earnings and the result of the action of said Commission on the shipping public, including the parties aggrieved is the same as if there was a contract, agreement or combination between the said C. N. O. &

58 T. P. Ry. Co. and the L. & N. R. R. Co. and the N. C. & St. L. Ry. and other southern roads for a pooling and division of earnings, and therefore in violation of said Sec. 5 and beyond the powers of said Commission and beyond the limitations on the powers of said Commission.

## VI.

(64) Your orators further show that the facts set forth below, in the concurring opinion of Commissioner Clements in which Commissioner Lane joined, were undisputed and admitted facts in said case No. 1542, and that the rules of law laid down by said Commissioner Clements as set forth below in said concurring opinion were sound rules of law applicable to said case No. 1542, and that said commission in its said report which was made a part of the order in said case No. 1542, arbitrarily, oppressively, unlawfully, unjustly and unconstitutionally ignored said facts and laid down rules of law contrary thereto and thereby deprived the said parties aggrieved of their property and just rights and of the full and



adequate relief and remedy to which complainants and the parties aggrieved were and are entitled.

Your orators further show that they hereby adopt said concurring opinion of said Commissioner Clements as a part of this their Bill of Complaint as bearing on a just and reasonable schedule of rates and as showing to this court the admitted facts and correct rules of law applicable thereto in this case, the same being as follows, to-wit:

"CLEMENTS, *Commissioner*, concurring:

"When concurring in the order of the Commission, reducing the rates involved from Cincinnati to Chattanooga, because, although the reductions are slight, they afford some relief, I am convinced that the reductions made do not meet the just demands of the complaint, in view of the facts shown. Nor do I agree to all the statements or the reasoning or conclusions of the foregoing report. And the attempt in these cases, which involve rates from Cincinnati and Chicago to Chattanooga only, to review the report and conclusions in the former cases, which were directed to rates to eight representative southeastern cities, including Chattanooga, makes it necessary in my view to call attention to many matters which either have been overlooked or only partially treated in the present report and which relate to the general adjustment of rates from the northwest to the southeast. \* \* \*

"I have suggested that complainants are entitled to greater relief than that proposed in the report. There is no doubt of the  
59      flourishing condition of the Cincinnati, New Orleans & Texas Pacific and in my mind none that it can operate with a reasonable profit under further reduced rates or that by such rates a hardship will be worked upon the carriers in the other and longer route between Cincinnati and Chattanooga. The Cincinnati, New Orleans & Texas Pacific is a leasing company, capitalized at \$5,500,000, consisting of \$2,500,000 preferred and \$3,000,000 common stock. The present rental of the Cincinnati Southern is slightly in excess of \$1,000,000 per annum. The history of this property is set out at some length in the report. Looking to a comparison of financial conditions it appears that for the years 1904, 1905, 1906, and 1907, gross earnings per mile from operations of the Cincinnati, New Orleans & Texas Pacific and Southern Railways and Groups 1, 2, and 3 of the Commission's system of grouping for statistical purposes, were as follows:

	1904.	1905.	1906.	1907.
Cin., N. Orleans & Tex. Pac. . . . .	20,193	21,730	24,965	25,831
Southern . . . . .	6,295	6,687	7,273	7,506
Group 1 . . . . .	13,994	14,511	15,528	16,314
Group 2 . . . . .	20,187	20,752	22,517	24,538
Group 3 . . . . .	11,863	12,483	13,789	14,922

"Groups 1, 2, and 3 include all of New England, New York, Pennsylvania, New Jersey, Delaware, Maryland, and a portion of West Virginia, also Ohio, Indiana, and the southern peninsula of Michi-

gan, and are by far the greatest revenue producers. As to other seven groups the Cincinnati, New Orleans and Texas Pacific produces in every case gross revenues per mile three to four times greater. It will be observed that the Southern Railway produces not one-third the gross revenue per mile of the Cincinnati Southern. The average gross earnings per mile of the railroads of the whole United States for the year 1906 was \$10,460. The density of traffic on the Cincinnati, New Orleans & Texas Pacific has gradually increased from two in 1894 to nearly three times in 1905 the average density of all the roads in the United States, and from 1904, when the density per mile of line about equaled the average in Group 2, which includes Delaware, New Jersey, Maryland, the greater part of Pennsylvania and New York, and a small portion of West Virginia, the increase on the Cincinnati, New Orleans & Texas Pacific has been gradual until in 1906 this road's density was materially greater than that of Group

2. During three years this line has consistently enjoyed about 60 five times the density per mile of the Southern Railway, by which it is controlled. The increase in density of traffic on the Cincinnati Southern was 169 per cent. greater in 1906 than in 1904, as compared with 115 per cent. average increase of all roads in the United States during that period, or 54 per cent. in favor of the Cincinnati, New Orleans & Texas Pacific in the matter of increase.

"The following table shows number of tons of freight carried per mile of line by the Cincinnati, New Orleans & Texas Pacific as compared with the Southern Railway, Groups 2 and 3, and the average in the United States:

	1904.	1905.	1906.
Cin., N. Orleans & Tex. Pac. ....	2,038,497	2,163,643	2,636,587
Southern .....	449,203	467,477	527,031
Group 2 .....	2,059,168	2,200,372	2,413,924
Group 3 .....	1,379,785	1,457,855	1,713,615
Average, United States .....	829,476	861,396	982,401

"The ratio of expenses to operating income of the Cincinnati, New Orleans & Texas Pacific for 1904, 1905, and 1906 is shown in the following table, as well as a comparison with the Southern Railway and Groups 3 and 5, which groups cover the territory involved in these complaints:

	1904.	1905.	1906.
Cin., New Orleans & Tex. Pac. ....	73.41	73.65	72.98
Southern .....	70.30	69.99	71.35
Group 3 .....	74.52	73.68	70.57
Group 5 .....	70.66	71.34	73.04

\* \* \* \* \*

"The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Decatur division \$25,227.72, and the Cincinnati to Louisville division \$24,618.15. The average of the whole system was lowered by numerous unprofitable branch lines, one of which earned only \$718.48. The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system.

To a certain extent this is true, but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.

61 "The gross earnings of the Nashville, Chattanooga & St. Louis in that year averaged \$9,882 per mile and the earnings of its main line from Hickman, Ky., to Chattanooga, were \$20,295 per mile.

"Numerous other statistics both from this record and from the Commission's files might be produced but I shall merely point out by way of comparison that the first class rate from New York to Chicago, a distance of about 900 miles, is 75 cents, or 1 cent less than the Cincinnati-to-Chattanooga rate for 335 miles, and the local first class rate from Chicago to Cincinnati, a distance of 298 miles, is 40 cents. Objection possibly will be made to this comparison because the carriers do not operate in the same general territory. The only object, however, in so confining a comparison is to consider the respective rates in the light of substantially similar circumstances and conditions of carriage. Reference to tables of earnings, density of traffic, etc., herein will show that these rates are made under transportation conditions less favorable in these respects than the rate from Cincinnati to Chattanooga. Only Group 2, embracing the eastern half of the New York-Chicago haul approximates the defendant's high standard of general transportation conditions, and Group 3 is far below that standard. Under these circumstances this comparison with the highly competitive Official Classification territory should go far toward convincing that the rates in issue are greatly in excess of a reasonable charge.

"It is stated in the report that—

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."

"Plainly then some very substantial reasons should be advanced for denying the relief asked for, bearing in mind, of course, the general conditions in this territory and having due regard for the interests of other routes. This suggestion in my opinion is not met by apprehension of injustice to the Louisville & Nashville and Nashville, Chattanooga & St. Louis, whose financial condition is not shown to require less remedial action, or by the reasoning by which it is sought to show that the middle west magnifies its troubles or by which the eastern carriers are absolved from all responsibility for the existing conditions. \* \* \*

62 "As already stated, the present rates from Cincinnati to Chattanooga have been in effect for twenty-eight years, although Nashville, Atlanta, and other southern points have had relief, more or less justified in theory and in the degree, extended in the different cases. Reductions to Chattanooga have been made from the east and in conjunction with one of the defendants in this proceedings. Looking to the history of the rates from these sections there is no doubt that

as to Chattanooga from the west. Something is radically wrong, and in disposing of the complaint adequate relief should be given. I do not believe this would result in a wholesale disturbance of just rates to points throughout the south. So far as it would aid in the correction of unjust rates to other places the result is not to be deplored. Judged by any one of the consideration- recognized either by the Commission or the courts in determining the reasonableness of transportation charges, the rates complained of exceed the limit of reasonableness to a greater extent than is declared in the report and should be dealt with accordingly.

"I am authorized by Commissioner Lane to state that he concurs in these views." (18 I. C. C. R. 467-477.)

(65) Your orators further show that groupings of the railroads of the United States as fixed by the Interstate Commerce Commission and referred to in paragraph—(64) thereof, are indicated on drawing hereto attached and marked exhibit "C" and made a part hereof.

(66) Your orators further show that the facts alleged in this Bill of Complaint are all the material facts showing that said 76 cent schedule of rates was unjust and unreasonable; that the facts alleged in this Bill of Complaint are all the material facts showing that said 60 cent schedule of rates would be just and reasonable; that there were no other material facts before said Commission in said case No. 1542 other than those set forth in this Bill of Complaint; that there were no material facts within the cognizance of said Commission in said case No. 1542 except the facts set forth in this Bill of Complaint.

#### VII.

(67) Your orators further show that said C. N. O. & T. P. Ry. Co., pursuant to said order in said case No. 1542, did publish and file with the Interstate Commerce Commission, effective as and of the 15th day of July, 1910, a schedule of rates in cents per hundred pounds, to-wit:

Class .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

Your orators further show that said C. N. O. & T. P. Ry. Co. threatens to continue said schedule of rates for at least two years from the 15th day of July, 1910.

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#### VIII.

(68) Your orators further show that said order in said case No. 1542 is null and void and of no validity whatsoever, and that said Commission was and is without any power or authority in law to make the same or to enforce the same; and said Commission exceeded its powers in that behalf; that said decision and order of said Commission is contrary to law and is in violation of the Constitution of the United States, particularly Article 5 of the Amendments to the Constitution of the United States in that the effect of the enforcing of said order is to deprive the parties aggrieved of their property without due process of law, and the taking of private property of the parties aggrieved without just compensation; that said order and the findings of fact and conclusions thereon which were made part and parcel of said order, all as set forth in Exhibit

"A" hereto attached and made part hereof, were based upon such unreasonable exercise of power on the part of said Commission as to be merely within the shadow of the powers conferred on said Commission and to be in direct violation of the substance of the powers conferred on said Commission: that said Commission evaded its duty to give substantial relief to the complainants in said case No. 1542 for its own mere convenience and gave complainants a mere shadow of relief and ignored the measure of justice due complainants; that said Commission acted upon conjectures and applied erroneous rules of law and that said Commission also found some sound rules of law and failed to apply said sound rules of law, and that said Commission acted by mere fiat and acted arbitrarily; that said Commission having before it the fact that said C. N. O. & T. P. Ry. Co. under said 76 — schedule of rates was earning 44.43 per cent. per annum on the value of the property employed in and devoted to the public service and use and for the public convenience by arbitrary action, by such unreasonable exercise of its powers, by mere fiat, arbitrarily, unjustly, unlawfully and unconstitutionally prescribed a new schedule of rates, to-wit: said 70 cent schedule of rates, which will yield to said C. N. O. & T. P. Ry. Co. 44.18 per cent. per annum on the said value of its said property, and that said reduction was a mere pretense of action on the part of said Commission, and while pretending to give complainants in said case No. 1542 relief was giving said complainants the mere shadow of relief, and merely reduced the annual revenue of said C. N. O. & T. P. Ry. Co. by the comparatively trifling

64 sum of \$12,000 a year, being a mere one-fourth of one per cent. per annum on the value of its said property; that said Commission wholly failed to find that said 70% schedule of rates ordered by said Commission was a just and reasonable schedule of rates.

(69) Your orators further show that said parties aggrieved will be greatly and irreparably injured, and that a great and irreparable loss and damage will be inflicted upon the business of said parties aggrieved.

(70) Your orators further show that notwithstanding the facts set forth in this Bill of Complaint the said Commission maintains and intends to maintain, and will unless the same is enjoined, set aside, annulled and suspended by the order of this Honorable Court, maintain the order aforesaid as an effective order.

In consideration whereof and for as much as your orators are remediless in the premises and by the strict rules of the common law and are only relievable in a court of equity where matters of this nature are properly cognizable and relievable, your orators pray:

First. That the defendants named in the caption and in the body of the foregoing Bill of Complaint may be made parties defendant of this Bill of Complaint.

Second. That pending this action and before final disposition thereof that the defendant The Cincinnati, New Orleans & Texas Pacific Railway Company, be compelled by mandatory order to keep a separate account of any and all sums of money collected as freight on any and all shipments of goods, wares and merchandise

under said Classes 1, 2, 3, 4, 5 and 6, respectively, from said City of Cincinnati, Ohio, to said Chattanooga, Tennessee, and to hold the same subject to the further orders of this court.

Third. That said order of said The Interstate Commerce Commission in said case No. 1542 be suspended, set aside, annulled and declared void and of no effect.

Fourth. That said defendants, constituting said The Interstate Commerce Commission and said The Interstate Commerce Commission be restrained and enjoined from enforcing said order in said case No. 1542, and that they be further restrained and enjoined from compelling said defendant, The Cincinnati, New Orleans and Texas Pacific Railway Company, from complying with said order and that said defendant, The Cincinnati, New Orleans & Texas

Pacific Railway Company, be restrained and enjoined from  
65 maintaining and collecting said 70 cent schedule of rates.

Fifth. That said defendants constituting said The Interstate Commerce Commission and said The Interstate Commerce Commission by mandatory injunction be required:

(a) To set aside and annul said order in said case No. 1542.

(b) To reopen said case No. 1542 and proceed to the determination of said case No. 1542, and when said case shall have been so reopened and when proceeding to the determination of said case, apply thereto the limitations imposed by the Constitution of the United States, particularly the limitations imposed by Article 5 to the Amendments of the Constitution of the United States; to apply thereto the provisions of the Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto, and all other statutes of the United States; to keep within the limitations of the delegation of powers to said The Interstate Commerce Commission, and not to exceed the limitations on the powers of said The Interstate Commerce Commission; to act within the delegated powers of said Commission; to act reasonably within the powers delegated to said Commission; to administer the substance of the Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto; not to act within the mere shadow of the powers delegated to said The Interstate Commerce Commission by said Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto; to give the parties aggrieved and said complainants in said case No. 1542 substantial relief, and not deny them substantial relief and not give them the mere shadow of relief; that in determining said case not to act upon mere conjecture and not to act by mere fiat; not to act for the mere convenience of said members of said The Interstate Commerce Commission and the mere convenience of said The Interstate Commission; not to make the mere convenience of the Interstate Commerce Commission the measure of justice; not to act unconstitutionally, unlawfully, oppressively and unjustly; to apply to said matter in said case No. 1542 the full letter and spirit of the rules of law found by said Commission to be sound; not to apply thereto the unsound rules of law as announced by said Commission; to apply thereto correct rules of law referred to in this Bill of Complaint and all  
66 other sound rules of law; not to act arbitrarily in reference thereto; that said Commission proceed to find what would be a just and reasonable schedule of maximum rates; that said

Commission when it shall have reopened said case and proceeded to a determination of said case to avoid each and all of the objections made in this Bill of Complaint to said order of said Commission and to its findings and conclusions as contained in said report, which said report was by said Commission made part and parcel of its order in said case No. 1542, and to render to complainants in said case No. 1542 and to said parties aggrieved full justice; to determine said case according to rules of law to be announced and fixed by the court in this case.

Sixth. That this court reserve this cause pending the reopening and determination of said case No. 1542 before and by said Commission for the purpose of enabling this court to determine whether said Commission has proceeded to a determination of said case No. 1542 in accordance with the equities of this Bill of Complaint and the rules of law to be laid down by this court in this cause for the determination of said case and for such final order, judgment or decree in this cause as may be just and equitable.

Seventh. That your orators and the parties aggrieved have an accounting and such other and further relief as is or may be just and equitable and to which they may be entitled.

Eighth. That a temporary restraining order may issue, as the court may think proper in the premises enjoining and restraining the defendant as set forth in the preceding paragraphs and that a preliminary injunction may issue, and that a permanent injunction may be entered on final hearing as set forth in the preceding paragraphs of the prayer.

Ninth. That your Honors grant unto your orators a writ of subpoena of the United States of America directed to the defendants named in the caption and in the body of this Bill of Complaint, commanding them and each of them at a certain day and under a certain penalty therein to be specified, personally to be and appear before this Honorable Court and then and there a full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived) and to stand to and abide by such order and

decree herein as shall seem meet and agreeable to equity  
67 and in good conscience.

And your orators will ever pray, etc.

JONES & JAMES,  
*Solicitors for Complainants.*

FRANCIS B. JAMES,  
*Of Counsel.*

STATE OF OHIO,  
*County of Hamilton, ss:*

Ezra E. Williamson being first duly cautioned and sworn on oath, deposes and says that he is one of the complainants herein; that he has read the said Bill of Complaint and knows the contents thereof, and that the allegations therein contained are true.

EZRA E. WILLIAMSON.

Subscribed and sworn to before me this 14th day of July, 1910.

[N. P. SEAL.]

FRANCIS A. HOOVER,  
*Notary Public in and for Hamilton County, Ohio.*



# EXHIBIT "A"

OPINION No. 1283.

BEFORE THE

## Interstate Commerce Commission.

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No. 1542.

RECEIVERS & SHIPPERS ASSOCIATION OF CINCINNATI

*v.*

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAIL-  
WAY COMPANY ET AL.

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No. 1564.

CHICAGO ASSOCIATION OF COMMERCE

*v.*

PENNSYLVANIA COMPANY ET AL.

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*Decided February 17, 1910.*

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REPORT OF THE COMMISSION.

No. 1542.

RECEIVERS & SHIPPERS ASSOCIATION OF CINCINNATI  
*v.*  
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAIL-  
WAY COMPANY ET AL.

No. 1564.

CHICAGO ASSOCIATION OF COMMERCE  
*v.*  
PENNSYLVANIA COMPANY ET AL.

*Submitted May 10, 1909. Decided February 17, 1910.*

1. In 1894 this Commission decided what is known as the *Freight Bureau cases*, 6 I. C. C. Rep., 195, and ordered certain reduction in rates from Cincinnati to Chattanooga and other southern points, but the courts declined to enforce this order upon the ground that the Commission had no power to fix a future rate. Under the Hepburn Act the Commission was invested with such power and thereupon the present proceedings were begun for the purpose of obtaining the benefit of the holding of the Commission in the former cases, but only the rates from Chicago and Cincinnati to Chattanooga are involved. Upon the facts disclosed by the record; *Held*, That it is not clearly apparent that rates from the east discriminate against the west, and that, if so, that discrimination under all the circumstances of the case, is not undue; but that present rates on numbered classes from Cincinnati to Chattanooga are unreasonable to the extent that they exceed the rates named in the report herein.
2. There can be no such thing as judicial estoppel in the proceedings of this Commission, since its orders are not judgments nor is it a judicial body. If that principle could be applied to the decisions of the Commission it is manifest that it could have no application here, since the parties are not the same.
3. It is apparent that if distance is to be taken as the standard, rates from the complaining cities are much higher than from their rival trade centers upon the Atlantic seaboard; but where water competition enters as a factor some different basis of comparison than distance must be found.
4. The testimony shows that while the Cincinnati, New Orleans & Texas Pacific Railway is ordinarily regarded as part of the Southern Railway system, its operation is in fact entirely distinct from that of the Southern Railway. It is certainly doubtful whether in view of the *Commodities cases*, 213 U. S., 335, it can be affirmed that there is such a connection between the Southern Railway and the Cincinnati, New Orleans & Texas Pacific that these two companies can be held responsible under the third section of the act for the rates of one another.

5. Within certain limits a railroad company is bound to protect its territory, and within those limits this Commission may consider the rates and their effect upon the movement of traffic. The east and the west find a common market in this section of the south, and in determining whether the present rates from the west are reasonable one subject of inquiry is the movement of traffic under the present rates. The fair inference from the testimony seems to be that the relation in rates between the east and the west which has been in effect for the last third of a century does not to-day abnormally promote the movement of traffic from either section.
6. Neither the east nor the west has any vested right to sell a certain amount in this southern territory. Each section is entitled to a reasonable rate and to do what business it can under that rate.
7. A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, but it is not entitled to have that property paid for by the public.
8. In determining the reasonableness of rates from the west to southern territory the interests of all competing lines must be considered and not merely that line which can handle the business cheapest.

*Samuel O. Bayless, E. E. Williamson, Jesse A. Baldwin, and Henry C. Barlow* for complainants.

*Ed. Baxter and R. Walton Moore* for Cincinnati, New Orleans & Texas Pacific Railway Company; Southern Railway Company; Louisville & Nashville Railroad Company; and Nashville, Chattanooga & St. Louis Railway.

*C. B. Northrop* for Southern Railway Company.

*C. B. Fernald* for Pennsylvania Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; and Pennsylvania Railroad Company.

*George R. Nutter* for Merchants' Association of Boston, Business Men's Association of Holyoke, and Boards of Trade of Salem, Fitchburg, and Springfield, Mass., and of Portland, Me., interveners.

*J. C. Jones* for Trades League of Philadelphia, Merchants' Association of New York, Chamber of Commerce of Richmond, Board of Trade of Norfolk, Chamber of Commerce of Petersburg, Merchants' and Manufacturers' Association of Baltimore, and Travelers' & Merchants' Association of Baltimore, interveners.

*J. Keavy and E. E. Gates* for Indianapolis Freight Bureau, intervener.

#### REPORT OF THE COMMISSION.

##### *PROUTY, Commissioner:*

In 1894 the Commission decided *Cincinnati Freight Bureau v. C., N. O. & T. P. Ry. Co.* and *Chicago Freight Bureau v. L., N. A. & C. Ry. Co.*, 6 I. C. C. Rep., 195. These proceedings had been instituted by the commercial interests of Cincinnati and Chicago for the purpose of correcting an alleged discrimination in rates upon the numbered classes from points of origin in the central west as compared

18 I. C. C. Rep.

with rates from points of origin in the east to southern territory. The defendants in the *Cincinnati* case were the members of the Southern Railway & Steamship Association, including practically all the lines of railway operating south of the Potomac and Ohio and east of the Mississippi rivers, together with various lines of steamships plying between North Atlantic ports like New York and Baltimore and southern ports like Charleston and Savannah. The Chicago complaint added to these certain lines of railway operating between Chicago and the Ohio River.

As already said, the gravamen of the complaint in both cases was that rates upon the numbered classes from the central west represented by Cincinnati and Chicago to various points of consumption in the south were too high, as compared with rates upon the same classes from points of origin in the east to the same destination in the south. These rates were made by the Southern Railway & Steamship Association, and the theory of the complainants was that the members of this association were jointly responsible for the rates established by the association, and that, therefore, if an undue preference was created by such rates in violation of the third section the Commission might by its order direct the various defendants to cease and desist from such violation of law. The defendants took the ground that even though the rates established by the individual lines were fixed by or at the dictation of the Southern Railway & Steamship Association they were none the less, when published, the individual rates of the individual lines over which they applied; that, therefore, no line could be held responsible for a rate to which it was not a party for the mere reason that it had been suggested by the association. Since at that time the same line of railway did not in any case handle traffic to these southern points from both the east and the west, the Commission would be, upon the theory of the defendants, without jurisdiction to find or correct the preference.

Without quite deciding the question the Commission was inclined to adopt the view of the defendants and to hold that the rates when established were those of the individual lines and that the Commission could not, therefore, inquire whether these defendants by their rates did or did not unduly prefer the east to the west.

The complaint of the Cincinnati Freight Bureau contained no allegation that the rates from western to southern points were unreasonable, but that of the Chicago Freight Bureau did allege that these charges upon the numbered classes from Cincinnati and other Ohio River crossings to southern points of destination were excessive, and that the rates from Chicago were even more excessive. The Commission held that under this allegation it might inquire into the inherent reasonableness of these rates and proceeded to dispose of the case upon

that ground, holding that the rates from Cincinnati were too high and should be materially reduced.

Below are given the rates then in effect from Cincinnati to Chattanooga and those ordered by the Commission, showing the reductions made.

Classes -----	1	2	3	4	5	6
Rates in effect.....	76	65	57	47	40	30
Reduced rates.....	60	54	40	30	24	22
Reductions -----	16	11	17	17	16	8

Rates from Chicago to Chattanooga were made by adding the full local rates from Chicago to Cincinnati to the rates in effect from Cincinnati to Chattanooga. The Chicago Freight Bureau contended not only that the rate from Cincinnati was too high, but that the through rate from Chicago should be less than the combination. This claim upon the part of the Chicago Freight Bureau was not apparently sustained by the Commission, and rates from Chicago were left to be constructed by combining the full local rate to Cincinnati with the reduced rate from Cincinnati south.

It may be here noted that the present rates from Cincinnati to Chattanooga are the same as they were in 1894, but that the through rates from Chicago to Chattanooga were in 1895 reduced 5 cents, first class, and various amounts upon the other classes, to meet a corresponding reduction from St. Louis, and are therefore at the present time less than the full local combination.

Neither the report nor the order of the Commission attempted to fix the relation of rates to southern points between the east and the west. The order simply directed the defendants to cease and desist for the future from charging rates from Cincinnati to Chattanooga and various other points in the south which were in excess of those found to be reasonable by the Commission.

This order was not complied with, and the Commission thereupon instituted proceedings in the circuit court for the southern district of Ohio to enforce obedience to its requirements, and such proceedings were had in that suit that the Supreme Court of the United States finally directed a dismissal of the bill of complaint upon the ground that, under the act to regulate commerce, as it then stood, the Commission had no authority to establish a rate for the future; that this order was in effect the fixing of a future rate, and therefore without warrant of law and void. *Interstate Commerce Commission v. C., N. O. & T. P. Ry. Co.*, 167 U. S., 479.

No question of fact was passed upon in that proceeding by either the circuit court or the circuit court of appeals or the Supreme Court of the United States.

Under the Hepburn Act of 1906 the Commission was invested with jurisdiction to establish a rate for the future, and thereupon

the present proceedings were begun for the purpose of obtaining the benefit of the holding of the Commission in the former cases. In the first of these cases the Receivers and Shippers Association of Cincinnati is the complainant and the Cincinnati, New Orleans & Texas Pacific Railway Company and the Southern Railway Company are the only defendants. In the second the Chicago Association of Commerce is the complainant and the Pennsylvania lines, both east and west of Pittsburg, are made defendants in addition to the defendants in the *Cincinnati case*. It will be noted that the commercial interests of the same localities, although under a different designation, are still complainants. The original cases put in issue rates to eight representative points in the south, of which Chattanooga was one, while these complaints refer to Chattanooga alone. The defendants in the original cases were all the members of the Southern Railway & Steamship Association, while in the present proceeding only the Cincinnati, New Orleans & Texas Pacific Company and the Southern Railway Company are attacked. Upon the face of the complaints, therefore, only rates to Chattanooga are involved, and those by only a single line of railway from Cincinnati to Chattanooga, but the complainants frankly admitted that they had selected Chattanooga and the Cincinnati, New Orleans & Texas Pacific, because they believed that this made the strongest case for their contention, and that it was their hope and expectation that whatever was done at Chattanooga must be extended to other points in the southeast. While, therefore, upon the record the parties are more restricted than formerly, the issue is in reality the same, and is, Will the Commission establish now the rates found reasonable in 1894?

It should perhaps be noted that the Indianapolis Freight Bureau has intervened in favor of the complainants, and that the Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway have intervened in behalf of the defendants. Certain commercial organizations in various parts of the country, but particularly in the east, asked leave and were permitted to appear at the hearings, produce testimony, and file briefs.

As already suggested, the question presented here is identical with that presented in 1894, and the complainants insist that the decision of the Commission in the former cases ought to be controlling in this case. This claim of the complainants may be first considered.

Plainly there can be no such thing as judicial estoppel in the proceedings of this Commission since its orders are not judgments nor is it a judicial body. If that principle could be applied to our decisions it is equally manifest that it could have no application here, since the parties are not the same.

It is, however, obvious that questions really the same must be often presented to the Commission in various proceedings to which the parties are entirely different. When a given situation has been fully considered and deliberately passed upon, that decision ought to be, if not binding upon the Commission, certainly of very great weight with it; but it should first be certain that the judgment of the Commission was applied to the same state of facts then as now.

Fifteen years have elapsed since the former cases were disposed of. Conditions have materially changed. The history of those years may throw light on the reasonableness of the rates involved. We are operating to-day under a different statute, and this may have influenced the defendants in making presentation of their defense. The order of this Commission fixing a rate for the future to-day is of more importance to the carrier than its order then. It is well understood that under the old law, where the whole question must be heard *de novo* by the court, carriers frequently neglected to introduce their whole case before the Commission, relying upon their ability to do so in subsequent judicial proceedings.

We can not, therefore, follow blindly the decision in the former cases, but must examine this record which contains, among other things, the former record before the Commission, and must reach upon the whole such conclusion as is warranted by the case as now presented.

As already stated the principal thing attacked by the original complaint was the discrimination against the central west and in favor of the east. The inherent reasonableness of the rates from Cincinnati and the central west to southern destinations was not referred to in the complaint of the Cincinnati Freight Bureau and only incidentally mentioned in that of the Chicago Freight Bureau.

To make out their case the complainants seem to have relied upon two classes of testimony: First, a comparison of rates and distances from the east and from the west to these southern points, and, secondly, the proceedings of the Southern Railway & Steamship Association.

The Commission held that it would not take jurisdiction to fix a just relation between rates from the east and from the west, but it found in the proceedings of the Southern Railway & Steamship Association a state of facts which in its opinion established a *prima facie* case against the reasonableness of the western rates themselves.

The Southern Railway & Steamship Association was a traffic association embracing substantially all the railway lines operating south of the Potomac and Ohio and east of the Mississippi rivers, and also steamship lines operating between north Atlantic ports and various southern Atlantic and Gulf ports. This southern territory is bounded upon the east by the Atlantic Ocean, on the south by the Gulf of



Mexico, and upon the west by the Mississippi River. The Ohio and Potomac rivers upon the north introduce an element of still further water competition. This territory is penetrated by rivers from the ocean and from the Gulf which permit water transportation to many points far inland. All this has from the first created a rate situation which was difficult to deal with, and which early induced attempts to establish by conventional means relative rates to various southern points. The Southern Railway & Steamship Association was one of the earliest and the most complete organizations of its kind.

Traffic from northern territory into this southern territory in 1878 originated mainly north of the Potomac and Ohio and east of the Mississippi rivers. The Southern Railway & Steamship Association undertook to divide this northern territory by a line drawn north and south and to determine that all traffic originating to the west of that line should move into southern territory via the Ohio River crossings, while traffic originating to the east of the line should move through the Virginia gateways or by water to southern ports like Charleston and Savannah and thence by rail.

The movement of this traffic from northern territory into the south was covered by southern classification which consists of six numbered and seven lettered classes. The numbered classes embrace for the most part manufactured articles, while the lettered classes generally include products of animals and of the soil. At that time articles moving under the lettered classes originated almost entirely in the west, while the bulk of articles moving under the numbered classes was produced in the east. The complainants in the original cases claimed that the Southern Railway & Steamship Association, for the purpose of carrying out this division of territory, established rates upon the lettered classes into southern territory which were relatively low, and rates upon numbered classes which were relatively high from western territory, while from eastern territory the reverse was true, rates upon the numbered classes being relatively low and upon the lettered classes being relatively high. The purpose of this was to permit and encourage the movement of manufactured articles from the east and to prohibit and discourage the movement of such articles from the west.

The Commission seems to have sustained this contention of the complainants.

On page 246 of the report it is said:

The fact, which clearly appears, that rates on the numbered classes from central territory are made higher *than they otherwise would be*, for the purpose of securing to the eastern lines the transportation of that traffic from the territory set apart to them under the Southern Railway & Steamship Association agreement, itself raises a prima facie presumption of the unreasonableness of those rates.

The great influence of this fact appears all through the opinion of the Commission; nor can there be the slightest doubt that if the fact was as found by the Commission the conclusion must follow. The question then as now was upon the reasonableness of the rates. If the present rates are reasonable it makes no difference by what motive they were induced, but the present relation in these rates has existed for thirty years, and the rates themselves have stood in substantially their present form for a quarter of a century. If at the outset these carriers deliberately and intentionally established rates upon the numbered classes from the Ohio River and the central west which were higher than they otherwise would have been for the purpose of preventing the movement of manufactured articles from that section of the country and confining that movement to eastern lines this certainly shows conclusively that the rates when established were not just and reasonable, and in view of such fact this Commission should carefully inquire whether that injustice has been perpetuated, and if it has been should take every possible means to remove it. We inquire therefore, at the outset whether it was the original intention to establish upon these six numbered classes rates which were relatively higher from the west than from the east in order that the manufacturer of the east might find a market in this southern territory.

From territory north of the Potomac and Ohio rivers and east of the Mississippi River two possible routes were available to nearly all southern destinations, the one to the Atlantic seaboard, from thence by water to some southern port, and from thence by rail to the interior destination; the other all rail through the various Ohio River crossings. There was also the all-rail route through the Virginia gateways, which in general corresponded with the rail-and-water route first described.

The first railroads to be built in the south were from the seaboard to the interior, and the first movement of traffic by rail from both the east and the west to southern points, like Chattanooga, was via water and rail. When rail lines were extended from the Ohio River into this southern territory, and therefore began to bid for that business which had formerly gone by the eastern routes, a fierce contest between these rival lines sprang up. Traffic would be taken, for example, from St. Louis, carried by rail to New York, from thence by water to Savannah, and again by rail to Meridian, Miss., a total distance of more than 2,000 miles, whereas it could have been hauled by the Mobile & Ohio in a direct line from St. Louis to Meridian, a distance of 512 miles. So traffic originating at New York might be taken west to Chicago and thence south to Atlanta, instead of being carried by the direct water line from New York to Savannah and thence to Atlanta. All this resulted in a great waste of transportation energy

and in a demoralization of rates which seriously affected the revenues of the carriers.

For the purpose of correcting this situation the Southern Railway & Steamship Association, in connection with northern lines, divided the northern territory by line drawn from Toronto through Buffalo and Pittsburg to Huntington, W. Va. The communities located upon this line, and known as the Buffalo-Pittsburg zone, were to be regarded as neutral territory. It was further recognized that traffic originating in all this western territory might with propriety move through North Atlantic ports to South Atlantic ports, and also into a narrow fringe of territory in the south along the Atlantic Ocean, and that traffic originating even in the east might move through the Ohio River gateways to certain portions of the western part of southern territory. Broadly speaking, however, the decree of the Southern Railway & Steamship Association was that traffic originating to the west of the Buffalo-Pittsburg zone should move into southern territory via the Ohio River crossings, and that traffic originating east of this zone should move into southern territory via the Virginia gateways and the Atlantic ports.

This division of territory was enforced by the withdrawal of all through rates between the prohibited territories. Eastern lines declined to make through rates from west of the Buffalo-Pittsburg zone into southern territory, and western lines declined to join in through rates into the south via Ohio River crossings from eastern points of origin. When traffic moved otherwise than as dictated by this division of territory the respective lines agreed to apply to it their local rates, and in every possible way embarrass that movement.

The proposition to effect this division of territory seems to have been first formally made in 1878. The earliest definite suggestion of this sort which may be termed official seems to be found in the proposition made by John B. Peck, the general agent of the Southern Railway & Steamship Association, in October of that year. This was followed by various suggestions and resolutions at different meetings of the association and of various committees. The proceedings of the association were kept in great detail, have been published, and are made a part of this record.

The final meeting for the purpose of putting in the rates themselves was held at Nashville December 12 to 18, inclusive. At that meeting the eastern lines submitted a report containing the following resolutions:

*Resolved*, That we find it necessary to abandon that feature in the Atlanta Convention committee's report in regard to distinguishing between exclusively eastern articles and articles manufactured both by the east and west. We therefore recognize all numbered classes and Class A as common to both east and west, and all lettered classes, except Class A, as peculiar to the west.

Rates to Augusta and to other interior Green Line points from Louisville and Baltimore to be the same on all numbered classes and Class A.

The western lines also submitted a report containing among other things the following statement:

The western committee recognize that the tariff which would result from exclusive eastern, exclusive western, and common articles, as unusual and cumbersome, and if it can be simplified consistently with all interests they will approve such action.

Rates to Augusta and other interior Green Line points shall not be less from Louisville than from Baltimore, to the same points upon all numbered or lettered classes.

The whole subject was referred for final decision to the general commissioner of the association who decided:

That all distinctions between articles common to the east and west and peculiar to the east, be abrogated, and the classes 1, 2, 3, 4, 5, 6, and A to be considered common to all lines.

On all classes the rates from Louisville to Dalton, Rome, and Atlanta shall be the same as rates established by the eastern lines from Baltimore to the same points.

It will be seen, therefore, that the final conclusion of this whole matter was that all articles moving under the numbered classes and Class A should be regarded as common both to the east and to the west. At no time was there any suggestion that higher rates from the west than the east should be imposed upon such articles, but only upon those articles which were exclusively the product of the east.

In the original case the operations of the Southern Railway & Steamship Association were mainly relied upon by the complainants to establish a ground for relief. It was claimed that this association was virtually a conspiracy in which eastern lines outvoted and outweighed western lines, and by which, therefore, an adjustment of rates was established and maintained which was unduly favorable to the stronger eastern lines. The proceedings of this association were all before the Commission and were fully considered. The exact theory upon which the Commission actually decided those cases does not seem to have been foreseen by either party upon the hearing, nor did the defendants apparently apprehend the importance which would be placed in the decision of the Commission upon this particular point, which was not, therefore, fully developed in the hearing before the Commission.

It has already been noted that suit was brought by the Commission to enforce compliance with its order, and as the law then stood this involved a retrial *de novo* by the court of all contested issues of fact. Some testimony was taken by the Commission and much by the defendants.

Certain merchants doing business at Cincinnati also brought proceedings in equity against lines leading from Cincinnati south to compel a more favorable adjustment of rates from Cincinnati into southern territory, the title of this suit being *Shinkle, Wilson & Kreis Co. v. L. & N. R. R. Co.*, 62 Fed. Rep., 690; 76 Fed. Rep., 1007. In this suit much testimony was taken both by the complainants and by the defendants.

In both the above cases the point which we are now considering was fully gone into in testimony by the defendants. A considerable number of railroad officials, originally indentified with the agreement of 1878, were produced as witnesses. Some of these persons have since deceased and in such cases the depositions formerly taken for use in the circuit court have been introduced into this record. If the witness was still living, we required his production in person upon the hearing of this case, and several witnesses were produced and examined orally upon that point. The testimony of these witnesses is all explicit that no understanding or agreement of the kind found by the Commission was ever entered into. The managers of lines leading from the Ohio River south earnestly insisted that they did not make and that they would not have made any agreement by which the growth of manufacturing enterprises upon their lines should be stifled. So far as testimony can establish any fact it is now established by that in this record that rates upon the numbered classes were not in 1878 intentionally made higher relatively from the west than from the east.

The rates themselves are pointed to as absolutely conclusive in favor of the contention of the defendants. We have seen that this proposition was under consideration during the summer and fall of 1878; that the final meeting was held about the middle of December that year. The rates themselves were made effective January 15, 1879. It will be remembered that, according to the terms of the agreement, rates from Louisville to Atlanta and Atlanta territory were to be no higher than from Baltimore upon the six numbered classes. The rates then established, according to the testimony of Mr. Peck, from Baltimore and Louisville to Atlanta were as follows:

From—	Classes.											
	1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	F.
Baltimore .....	\$1.19	\$1.04	\$0.74	\$0.71	\$0.56	\$0.41	\$0.26	\$0.41	\$0.41	\$0.41	\$0.56	\$0.77
Louisville .....	1.19	1.04	.79	.71	.56	.41	.30	.48	.49	.44	.48	.88
Baltimore, lower .....							.04	.07	.08	.05	*.08	.11

\* Higher.

The claim of the complainants is that rates upon the numbered classes were relatively high from the west and upon the lettered classes relatively low from the west, while from the east the numbered classes were low and the lettered classes were high, yet it seems from an examination of the above rates that exactly the reverse was true. While the numbered classes were the same from Baltimore and Louisville, all lettered classes except E were lower from Baltimore.

The rates then established to Chattanooga from New York and Chicago were, according to the testimony of Mr. Peck, as follows:

From—	Classes.											
	1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	F.
New York.....	\$1.25	\$1.10	\$0.85	\$0.75	\$0.60	\$0.45	\$0.30	\$0.15	\$0.45	\$0.60	\$0.60	\$0.85
Chicago.....	1.15	1.00	.86	.58	.51	.48	.39	.50	.48	.45	.50	.90
New York, higher.....	.10	.10		.17	.09					.15	.10	
New York, lower.....			.01			.03	.09	.05	.03			.05

It will be seen here that the rates upon four of the six numbered classes were distinctly higher from New York, upon two of those classes slightly lower, while upon two of the lettered classes they were higher and upon four of the lettered classes lower.

The principal traffic from the west to these southern points was then and has continued to be products of animals and of the soil moving under the lettered classes, and the competition between lines carrying this traffic has probably resulted in a reduction of rates upon the lettered classes from the west, while such rates, not being of great importance from the east, have remained substantially stationary. It will also be noticed that under competitive conditions rates to-day have come to be slightly lower to Chattanooga, first class, from New York than from Chicago.

There was in the proposition of October, 1878, and in some of the subsequent proceedings the suggestion that certain articles were exclusively manufactured in the east and that upon such articles prohibitive rates should be charged from the Ohio River, but the final conclusion was otherwise. To these proceedings of December apparently no reference was made before the Commission. The rates themselves, which were published in January, 1879, were not in evidence. The testimony of those witnesses who had entered into that arrangement upon the part of the railroads was not produced upon the original hearing. Upon the record as then made the finding of the Commission was natural, but a contrary conclusion must follow from the record now before us.

It is possible that the rates established *did* in fact then discriminate against the west. It is possible that though fair at the outset

subsequent changes in condition may have made them unfair. These are different questions. We only note here that there was no intention upon the part of those who framed this adjustment to make such discrimination. In examining the issues presented we must not set out with that bias.

Two questions are presented for decision, first, Do rates upon the numbered classes to Chattanooga discriminate in favor of the east as against the west, and, incidentally, has this Commission jurisdiction to correct that discrimination in this case if found to exist and to be undue? Second, Are the rates upon these numbered classes from Cincinnati and Chicago to Chattanooga unreasonable considered in and of themselves?

The complainants support the charge of discrimination by reference to the rates and distances in force from northern points to Chattanooga as compared with rates and distances from Cincinnati and Chicago to that point. Below is given a table showing these rates and distances and percentages of rate and distance from New York as compared with Chicago and Cincinnati.

*Rates to Chattanooga.*

From—	Dis- tance.	Classes.												
		1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	F.	H.
	<i>Miles.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>
Cincinnati .....	338	76	65	57	47	40	30	20	29	25	21	34	42	39
Chicago .....	595	111	95	79	62	53	40	32	41	35	31	47	62	54
New York .....	847	105	93	83	68	56	44	36	48	40	39	58	78	60
Philadelphia .....	756	105	93	83	68	56	44	36	48	40	39	58	78	60
Boston .....	1,082	105	93	83	68	56	44	36	48	40	39	58	78	60
Baltimore .....	659	98	87	78	63	52	41	34	45	37	36	55	72	57

*Percentage of distances and of classes.*

	Dis- tance.	Classes.													
		1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	F.	H.	
	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>	
Chicago of New York....	70	106	102	95	91	95	91	89	85	87	80	81	79	90	
Cincinnati of New York .	40	72	70	69	69	73	68	56	60	62	50	59	54	65	

An examination of this table will show that the rate per mile is much lower from the east than from the west. The distance from Chicago to Chattanooga is but 70 per cent of that from New York to Chattanooga, while the first class rate is 106 per cent. The distance from Cincinnati is but 40 per cent, while the first-class rate is 72 per cent. It is apparent that if distance is to be taken as the standard,



rates from the complaining cities are much higher than from their rival trade centers upon the Atlantic seaboard.

The defendants concede the accuracy of the above figures, but insist that the rates from the east are forced by water competition and can not, therefore, be taken as the standard by which to determine a reasonable rate or from which to draw the inference that the discrimination is undue. These distances and rates are all-rail, while traffic from the east moves largely by ocean and rail and while the rates are entirely dictated by those routes.

No question is made but what traffic can move from the various north Atlantic ports to interior southern points by ocean to the southern port and by rail from the southern port. The bulk of the traffic actually moves in that way. With respect to most of this territory the rail rates and the ocean-and-rail rates are the same, but in case of territory lying near the Atlantic seaboard the all-rail rates are somewhat higher. It can not be doubted that the ocean-and-rail transportation charges do absolutely fix the charge which all-rail lines can make and do therefore determine the rates from these northern ports to southern territory.

This being so, it is plain that the all-rail rates from eastern points of origin can not properly be compared with all-rail rates from the west to corresponding destinations in the south. It is 12,000 miles from New York around Cape Horn to San Francisco, and still rates by that route for years absolutely fixed the rate which rail carriers could make for a haul of 3,000 miles across the continent. The present Tehuantepec route involves an ocean carriage of more than 4,000 miles, a rail carriage of about 175 miles, and two transfers between ship and car. The Commission has recently established as reasonable for a distance of 1,500 miles, from St. Paul to Spokane, rates higher than those made by this route between New York and Pacific coast terminals. In order, therefore, to determine whether these rates from the west are too high, as compared with these water competitive rates from the east, some different basis of comparison must be found.

The testimony shows that steamship lines operating between the north Atlantic ports and these south Atlantic ports, accept for their portion of the through rate an amount based upon an arbitrary mileage, which is 250 miles from New York, Philadelphia, and Baltimore to Savannah, and 160 miles to Charleston. From Savannah to Atlanta the distance is 260 miles. Traffic from New York to Savannah en route for Atlanta moves about 750 miles by water, but the ocean carrier accepts for its division a distance of 250 miles. The defendants insist that if any mileage is to be stated with respect to this ocean and rail traffic, that mileage should be fixed upon the basis of divisions, and this would seem to be reasonable, for if the

water line will accept a division upon that basis, then, so far as the cost of transportation is concerned, New York stands within 250 miles of Savannah or within 510 miles of Atlanta.

Upon this basis the defendants insist that these rates do not unduly discriminate upon a mileage comparison as against the west. When the relation in rates was first fixed, January 15, 1879, Atlanta was the most important point in the south, and the testimony indicates that three-quarters of this competitive traffic was governed by the Atlanta rate. Upon the above basis the distance from New York to Atlanta is 510 miles, the present rate \$1.05, while the distance from Cincinnati is 474 miles, with a first class rate of 98 cents, and from Chicago, 769 miles, with a rate of \$1.38. If distances are to be computed on this basis and if Atlanta is to be taken as a typical southern point, it is evident that there is no discrimination in favor of the east.

An exhibit has been filed showing distances constructed in this manner from New York, Baltimore, Cincinnati, Louisville, and Chicago to Atlanta, Macon, Milledgeville, Augusta, Columbus, Albany, Chattanooga, Knoxville, Birmingham, and Montgomery; and defendants state that these are fairly representative points. The average distance from New York to such points is 530 miles, the average rate, all classes, 70.8 cents, the average rate per ton-mile 0.0267. The average distance from Cincinnati is 507 miles, the average rate 69.6, the average rate per ton-mile 0.0274. The average distance from Chicago is 765 miles, the average rate 91.4, the average rate per ton-mile 0.0239.

If reference be had to Chattanooga alone it is plain that, construing distances even upon the basis claimed by the defendants, the rate to that city is too high from the east on a mileage standard as compared with Cincinnati and the west, and it is probable that the same is true of other points in different parts of the south where competitive conditions have forced a lower rate from the east without reference to the west.

If the discrimination exists as alleged by the complainants, is it undue and have we jurisdiction to correct it? The complainants have selected Chattanooga as the only point in the south to which reference is made by them, and this locality probably presents their view more strongly than any other. Let us consider that, without, however, conceding that this whole situation is to be condemned if found unlawful to Chattanooga alone.

First, a word as to the entire situation. Railroad lines in the south were first constructed from the Atlantic seaboard to the interior. Communication between interior cities and eastern cities, like New York, was first established by ocean to the south Atlantic port and by rail from that port. Chattanooga itself, though lying far

to the north among the mountains and 400 miles from the ocean, was first reached by rail in this way. The early means of communication established business connections between the east and the south which have always continued and which, though daily lessening, are still important. Business enterprises in the south have been largely fostered by eastern capital. When the northern lines from the middle west penetrated this territory it was natural that the transportation lines from the east and the business-houses in the east should exert themselves to maintain their hold upon this business.

It is also true that competition between lines from the east was extremely active. Distance upon the water is less a factor than upon the land. Norfolk, Charleston, and Savannah could be reached from New York at practically the same cost. From these different ports different independent lines of railway served the same city and also different cities. Chattanooga furnishes an excellent example. The Norfolk & Western Railroad in connection with the Southern Railway handles traffic from Norfolk to Chattanooga but not to Atlanta. Various lines lead from Savannah and Charleston to Atlanta which do not reach Chattanooga. Atlanta and Chattanooga are both distributing centers. If the goods are distributed from Chattanooga the Norfolk & Western can participate in that transportation; if from Atlanta it can not. Hence that road has insisted for many years that the rate from the east to Chattanooga shall be no higher than to Atlanta.

In 1905 rates from the east to Atlanta were reduced, first class, from \$1.14 to \$1.05. The Norfolk & Western immediately followed by a similar reduction to Chattanooga. The reduction at Atlanta had been due to a previous reduction of the same amount by lines reaching Atlanta from the Ohio River, but the rate to Chattanooga from the Ohio River had been left the same, thus aggravating the discrimination against Cincinnati. It seemed to the commissioner who heard this case that under these circumstances there was no warrant for the reduction from the east to Chattanooga and he called the traffic representative of the Norfolk & Western and inquired of him why the reduction had been made, and if it would be insisted upon. The answer was, that his company believed it necessary to maintain the same rate from the east to Chattanooga as was established to Atlanta and that it must insist upon that policy.

Can it be said that the action of the Norfolk & Western created an undue discrimination against Chattanooga? It has no connection with rates from Cincinnati to that locality. It does not base this rate from the east upon the rate from the Ohio River. It simply declares as a matter of policy that it will maintain to this city whatever rate its rival line makes to a rival city. Is not this legitimate

competition? Is it not the kind of competition which the act to regulate commerce itself aims to keep alive? Is it the province of this Commission to determine under those circumstances the relation between the rate from New York to Chattanooga and that from Cincinnati to Chattanooga; and if so, what shall its order be and how will it enforce it?

So of this whole southern situation. The eastern lines have decided to maintain a certain relation of rates between the east and the west upon these numbered classes; have determined that the rate, for example, from Baltimore shall not be higher than that from Louisville to certain points. In 1905, for reasons which have appeared in various cases and which need not be gone into here, lines leading from the west reduced their rates from the Ohio River and the middle west to Atlanta and various other points in the south, the reduction first class being 9 cents. Eastern lines immediately met these by corresponding reductions. Assume that before the reduction by the western lines there had been a discrimination in favor of the east of 9 cents, first class, which was removed by the reduction from the west and which was restored by the subsequent reduction from the east. Can it be said that this discrimination which now exists is undue? What in the act to regulate commerce prohibits these independent lines from exercising their right to maintain that relation in rates?

In the original case the Commission declined to exercise this jurisdiction. All railroad and steamship lines operating in southern territory were made parties to that proceeding, but it appeared that one set of carriers handled traffic from the east and another distinct set from the west. There was no single defendant which made these rates both from the east and from the west.

The case as now presented in this respect is different from the old case. There is to-day no traffic association which determines these rates; at least not nominally. Rates are the individual acts of the several defendants, but upon the other hand there is now here, as the complainants insist, a single defendant which names rates both from the east and from the west.

The proceeding in the Cincinnati case is directed solely against the Cincinnati, New Orleans & Texas Pacific Railway Company and the Southern Railway Company; and the Chicago case makes only these lines defendants south of the Ohio River. The Cincinnati, New Orleans & Texas Pacific Railway names the rate from Cincinnati to Chattanooga, and the Southern Railway publishes a rate from the east to Chattanooga. The Southern Railway owns a majority of the stock in the corporation which controls the operation of the Cincinnati, New Orleans & Texas Pacific Railway, and the same individual is president of both companies. The complainants insist that these two railroads are under the circumstances virtually one; that

this case stands as though the line from Cincinnati to Chattanooga were operated directly by the Southern Railway Company, in which event rates to Chattanooga would be made both from the west and from the east by the same company.

The testimony shows that while the Cincinnati, New Orleans & Texas Pacific is ordinarily regarded as a part of the Southern Railway system its operation is in fact entirely distinct from that of the Southern Railway. The officers of the Southern Railway have no control whatever over those of the Cincinnati, New Orleans & Texas Pacific and could not legally dictate the action of the latter company. The Southern is the owner and can of course finally secure such action upon the part of the Cincinnati, New Orleans & Texas Pacific as it may desire.

In the so-called *Commodities case* recently decided by the Supreme Court of the United States, *U. S. ex rel. The Attorney-General v. Delaware & Hudson Co.*, 213 U. S., 366, it was held that a railroad company owning a majority of the capital stock of a coal company and really controlling through that stock the operations of the coal company had no interest, direct or indirect, in the coal mined by the coal company. It is certainly doubtful whether in view of this decision it can be affirmed that there is such a connection between the Southern Railway and the Cincinnati, New Orleans & Texas Pacific that these two companies can be held responsible under the third section for the rates of one another. It seems probable that we must under this construction of the law dispose of this case as though these two companies were distinct in fact as well as in name and in operation, and if this is so the case stands before us to-day as it did in 1894.

It is, however, true that the Cincinnati, New Orleans & Texas Pacific is operated in harmony with the Southern Railway; that its rates and its policies are dictated by that company; and that the Southern Railway has practically the same authority to reduce this rate from Cincinnati to Chattanooga at present as it would have if it operated the line under its own name. This Commission has been inclined to look to the substance rather than the form in a case like this, *Eichenberg v. Southern Pacific Co.*, 14 I. C. C. Rep., 250. But here we doubt whether, if the Southern Railway itself operated this line from Cincinnati to Chattanooga, we ought to hold it responsible for this relation of rates. The Southern Railway is but a single carrier among all those serving this territory. It can not, whatever effort it may make, control that situation. It must bow to the competitive conditions which exist.

The second question presented by this record is upon the reasonableness of these rates from Cincinnati and Chicago to Chattanooga and indirectly into this entire competitive territory. The chief contention of the complainants is that these charges are extortionate in view of

the circumstances under which the service is rendered, but there is a preliminary matter bearing more remotely upon this issue of reasonableness which may be first referred to.

It is a maxim of rate making that the rate should be such, if possible, as to move the traffic. Within certain limits a railroad is bound to protect its territory, and within those limits this Commission may consider the rates and their effect upon the movement of traffic. The east and the west find a common market in this section of the south, and in determining whether the present rates from the west are reasonable one subject of inquiry is the movement of traffic under the present rates. It has been fifteen years since the former case was decided, and during all that time these rates have continued in effect. How has traffic actually moved under them from these two sections?

For the purpose of answering this question, the Commission required the carriers to take the months of March and September in 1907, and to show from their original records the actual movement of tonnage into this competitive territory, which was said to be the states of Georgia, Alabama, Mississippi, and, generally speaking, territory south of and including points upon the Memphis division of the Southern Railway and east of and including the main line of the Mobile & Ohio. These two months have been assumed to be representative of the entire year and the totals stated upon that basis.

This information has been compiled both with respect to the territory mentioned and also with respect to the city of Chattanooga alone. Without giving the details, these statements show that, excluding classes B, C, D, F, as above, 63.57 per cent of the entire tonnage into Chattanooga moves from points north of the Ohio and from the Ohio River crossings via western lines, and 36.43 per cent from eastern points via eastern lines. Taking the movement into the whole territory we find that 65.36 per cent moved via western lines and 34.64 per cent via eastern lines. It appears, therefore, that under the operation of these present rates western lines carry nearly twice as many pounds of those articles known as manufactured articles and general merchandise as do lines from the east.

The complainants criticised these statements and disputed their value in two respects. The statements did not include the movement of traffic from southern coast cities to the interior, which the complainants contend ought to be embraced. Quantities of merchandise are brought by water to southern ports at water rates and are distributed from there at the regular local rates, which are usually rates fixed or controlled by the railroad commissions of these South Atlantic States.

We are unable to see why this traffic should be embraced. The water rates upon which it moves are not subject to the jurisdiction of the Commission. The railroad rates are not in controversy in this



proceeding. The movement of this traffic is not induced by the rates before us, but is in spite of those rates. We are not inquiring whether the east or the west sells in this territory, but whether these rates are such as to induce an abnormal movement of traffic. The carriers were, however, required to produce this statement, and it appears that the tonnage moved from the coast cities to this territory is about 50 per cent of the entire movement from the east, as above stated.

The second criticism of the complainants is that the statements showing the movement of traffic from the west are not properly constructed. These statements embrace the movement of all articles classified under the Southern Classification except B, C, D, F, which as already said embrace products of the soil and of animals which are for the most part peculiar to the west. A considerable amount of this traffic moved at commodity rates, which are lower than the class rates applicable to the article. The complainants insist that only such traffic as moves under the class rates themselves ought to be included.

The question is whether the west has a fair rate for the movement of its manufactures and merchandise into the south. The defendants claim that the manufacturer and the merchant of the west has been taken care of by special commodity rates to a much greater extent than in the east. In 1894 there were upon the articles embraced in these classes but 31 commodity rates; in 1908 this number had increased to 121. The defendants were required to file a second statement showing the movement at class rates and the movement of manufactured articles and merchandise at commodity rates, from which it appears that nearly one-half the tonnage of these articles moving from the west is at commodity rates, while from the east the movement is largely under class rates. It also appears from this statement that the movement under first and second class rates is larger from the east than from the west, although the entire movement under class rates is larger from the west than from the east.

The fair inference from all these statements seems to be that this relation in rates between the east and the west which has been in effect for the last third of a century does not to-day abnormally promote the movement of traffic from either section.

This brings us to the inherent reasonableness of these rates themselves. Neither the east nor the west has any vested right to sell a certain amount in this southern territory. Each section is entitled to a reasonable rate and to do what business it can under that rate. The complainants insist that these rates from Cincinnati to Chattanooga, considered as transportation charges for the service rendered, are too high. It is this point upon which the complainants mainly rely and which presents the most doubtful and difficult question for determination.



The position of the complainants is this. They select rates from Cincinnati in all directions, except to points south of the Ohio River, for distances of from 300 to 350 miles and show that these rates in no case exceed 60 cents first class, and are often as low as 40 cents. They now compare the financial operations of the Cincinnati, New Orleans & Texas Pacific with the various railroads upon which the rates used as standards of comparison are made and also with the average result in the territorial groups in which those rates prevail. The claim is made that rates upon the Cincinnati, New Orleans & Texas Pacific ought to be as low or lower than those in territory north of the Ohio River and that therefore the present rates are excessive.

The railroad leading from Cincinnati to Chattanooga, and now operated by the Cincinnati, New Orleans and Texas Pacific Company, is the Cincinnati Southern. It was constructed by the city of Cincinnati, being opened for business about the year 1880. The original cost of the railroad was \$18,000,000, and the city subsequently expended in terminal facilities about \$2,500,000, making a total cost of \$20,500,000.

The city of Cincinnati had legislative authority to build but not to operate this railroad, and the Cincinnati, New Orleans & Texas Pacific Railway Company was organized for the purpose of leasing and operating the Cincinnati Southern Railroad. The first lease was for twenty-five years and expired in 1906, but this lease was extended by popular vote in the year 1901 for a term of sixty years, so that the present lease expires in 1966. The rental under the original lease was \$1,250,000 per year, or about 6 per cent upon the cost of the property. The rental under the present lease during the first twenty years of the term is \$1,050,000 per year, somewhat more for the balance, thus yielding a return in excess of 5 per cent upon the cost of the property. The city borrows this money for  $3\frac{1}{2}$  per cent, thereby making a clear profit of  $1\frac{1}{2}$  per cent upon the investment.

Cincinnati is 114 miles northeast of Louisville. Previous to the construction of the Cincinnati Southern all business for Chattanooga and the south and southeast passed through Louisville, and the rate was a differential above that from Louisville. Cincinnati was therefore obliged to pay upon all traffic to this its best market a higher transportation charge than its rivals upon the Ohio River. The purpose of constructing the Cincinnati Southern was to obtain a line from Cincinnati to Chattanooga which should be no longer than the line from Louisville, and which would therefore insure to that city the same rate to Chattanooga and all points in the south and southeast reached through that gateway which was enjoyed by Louisville. Immediately upon the opening of the Cincinnati Southern the rate from Cincinnati to Chattanooga was made the same as that from Louisville, and this relation has ever since been maintained; so that

the city to-day, in addition to the profit upon its investment of  $1\frac{1}{2}$  per cent, secures all the advantages contemplated by the construction of the railroad.

At the end of the term the railroad with all its betterments reverts to the city. In order to handle the business now offering over this road it has already been found necessary to expend large sums in double tracking and otherwise improving the physical condition of the property.

This railroad must inevitably be much more valuable in 1966 than it is to-day and these betterments will at that time belong to the city of Cincinnati, which is another source of profit from this enterprise. The investment has therefore proved a fortunate one for that community.

The Cincinnati, New Orleans & Texas Pacific Company was unable to pay the rental provided for a time and was in the hands of a receiver from 1893 until 1899. Since that time it has paid the stipulated rental and has shown very handsome returns from operations as well. This property to-day is unique among railroads in the south. Its gross earnings per mile for the year 1907 were over \$26,000, more than the average gross earnings of the railroads in any group in the United States and more than the gross earnings of most railroad systems in the United States. It carried during the year 1907 more tons of freight one mile than the average in any group in the United States. Its tonnage and its gross earnings per mile were nearly four times those of the Southern Railway, by which it is controlled.

The grades of this railroad are heavy, exceeding for 38 per cent of its distance a 1 per cent grade, and the cost of operation and maintenance is high, but nevertheless its net earnings, computed upon the basis prescribed by the Interstate Commerce Commission, have for several years last past reached \$7,000 per mile. If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.

The defendants insist that this ought not to be done because of the financial necessities of the Cincinnati, New Orleans & Texas Pacific Railway Company growing out of the peculiar relation of that company to this property.

This corporation has a preferred stock of \$2,500,000 upon which cumulative dividends of 5 per cent are payable, and common stock of \$3,000,000. All this stock represents a cash payment at par, as we understand the testimony. The dividend has been paid upon the

preferred stock and during later years a small dividend has been paid upon the common stock.

The company owns the equipment but has no interest in the railroad beyond the right to use it for the stipulated term. If, therefore, it is found necessary to reconstruct a bridge or lay an additional track, the company can not pledge that bridge or track for the necessary money with which to make the improvement.

The testimony shows that in order to handle the business offering it has been necessary already to expend large sums in the improvement of the roadway and structure, and that further large sums must be expended in the future. This money, say the defendants, can only be obtained from income from operation, and hence a sufficient rate should be allowed to permit the making of these necessary additions.

This position is not well taken. A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, but it is not entitled to have that property paid for by the public. This Commission has so decided in *Central Yellow Pine Asso. v. I. C. R. R. Co.*, 10 I. C. C. Rep., 505, and the Supreme Court has affirmed the correctness of that holding. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S., 441. If these stockholders have entered upon this enterprise without the means to provide necessary funds with which to carry it on, that can be no reason for the imposition of rates otherwise unreasonable.

The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Company, but also with reference to other companies whose rates are necessarily affected by these; otherwise stated the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company just as it would be the misfortune of some other company if it could not show as favorable earnings.

The rate from Cincinnati and Louisville to Chattanooga has been the same for the last twenty-eight years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future. Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati.

In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is

frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis & San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the east as was the case in 1905.

It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory. How far are we at

liberty to consider all this in fixing a reasonable rate over the Cincinnati, New Orleans & Texas Pacific. It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points.

Some indignation was expressed by several witnesses upon the part of the city of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad, that property was not more devoted to the interests of the city of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present, it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities, and the relation of rates would have continued the same. However this may be, the city has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital.

In *In the Matter of Proposed Advances in Freight Rates*, 9 I. C. C. Rep., 382, the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the *Spokane case*, 15 I. C. C. Rep., 376, the same subject was considered and the same conclusion reached. The last affirmance of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.*, 15 I. C. C. Rep., 555, in which the rule is stated by Clark, Commissioner, as follows:

In the *Spokane case*, 15 I. C. C. Rep., 376, we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. • • •

As before suggested, we can not, in determining competitive rates, select that railroad which is the shortest or most advantageously situated, and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines.

We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits.

The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville & Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis, between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile. Now, in adjusting the rates of the Louisville & Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section of the road by itself, or shall it establish a common rate for the whole?

Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch-line business when it reaches the main line is surplus traffic from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates upon the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.

This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907, over two-thirds of the tonnage was delivered to it by its connections, and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profit of to-day might not be a deficit.

The complainants urge that the Cincinnati Southern is really a part of the Southern Railway system. If it were so considered the gross earnings per mile of the entire system would be less than those of either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis.



If these rates are to be established with reference to other rates in the vicinity it becomes pertinent to inquire how the present rates compare with other rates for similar distances in the south. Extensive tables have been furnished by the defendants instituting such comparisons, and these tables have been to some extent criticised and replied to by the complainants.

It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the railroad commissions of most states in the south. They are as low and usually lower than the interstate rates made by southern roads for similar distances.

The complainants call our attention to rates from Cincinnati to Nashville. The distance is 300 miles and the rates are materially lower than those from Cincinnati to Chattanooga, being, first class, 53 cents as against 76 cents, and sixth class, 23 cents as against 30 cents. But this Commission has found, *Chamber of Commerce of Chattanooga v. Southern Ry. Co.*, 10 I. C. C. Rep., 111, and the federal courts have found, *East Tenn., Va. & Ga. Ry. Co., v. I. C. C.*, 181 U. S., 1, that water competition influences these rates to Nashville. The rate from Cincinnati to an intermediate point where there is no water competition is higher in proportion to distance than those to Chattanooga. Thus the first class rate from Cincinnati to Gallatin, 20 miles north of Nashville, is 78 cents.

The complainant also refers to rates from Virginia cities to Atlanta which are less per ton-mile than those in question. But it is well understood that these rates are materially affected by water competition, and ordinarily the long-distance rate should be less per ton-mile than the rate for the shorter distance. If rates from Virginia cities south for distances of from 300 to 350 miles are examined it will be found that they usually equal or exceed the Chattanooga rates.

The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for lower rates; and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past railways have been able to introduce various economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight one mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices.

We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive. In this case, upon a view of the whole situation, we do not feel that the rates



found to be reasonable in 1894 should be established to-day. We do, however, think that some slight reduction should be made in these rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory. In the readjustment of 1905 rates to Chattanooga from the Ohio River were not reduced, although those from the east were. We are of the opinion that the present rates are unreasonable, and that rates should be established upon the numbered classes, not exceeding in cents per 100 pounds the following:

Class	1	2	3	4	5	6
Rate	70	60	53	44	38	29

and it will be so ordered. The complaint of the Chicago Association of Commerce, No. 1562, will be dismissed.

CLEMENTS, *Commissioner*, concurring:

While concurring in the order of the Commission, reducing the rates involved from Cincinnati to Chattanooga, because, although the reductions are slight, they afford some relief, I am convinced that the reductions made do not meet the just demands of the complaint, in view of the facts shown. Nor do I agree to all the statements or the reasoning or conclusions of the foregoing report. And the attempt in these cases, which involve rates from Cincinnati and Chicago to Chattanooga only, to review the report and conclusions in the former cases, which were directed to rates to eight representative southeastern cities, including Chattanooga, makes it necessary in my view to call attention to many matters which either have been overlooked or only partially treated in the present report and which relate to the general adjustment of rates from the northwest to the southeast.

The following table shows, first, the first class rates complained of from Cincinnati to the eight southern points involved in the former Cincinnati case; second, the rates named by the Commission as maxima; and third, the rates now in effect resulting from subsequent reductions by the carriers:

*Rates from Cincinnati.*

To—	Old rates.	Rates named by Commission.	Present rates.
	Cents.	Cents.	Cents.
Atlanta, Ga.....	107	86	98
Anniston, Ala.....	107	86	98
Birmingham, Ala.....	89	87	89
Selma, Ala.....	108	108	108
Knoxville, Tenn.....	76	53	76
Chattanooga, Tenn.....	76	60	76
Rome, Ga.....	107	75	98
Meridian, Miss.....	122	114	106

The following table shows a like comparison of the rates to the same destinations from Chicago:

*Rates from Chicago.*

To—	Old rates.	Rates named by Commission.	Present rates.
Atlanta, Ga. ....	147	126	133
Anniston, Ala. ....	147	126	133
Birmingham, Ala. ....	119	111	114
Selma, Ala. ....	138	128	133
Knoxville, Tenn. ....	116	93	111
Chattanooga, Tenn. ....	116	100	111
Rome, Ga. ....	147	114	133
Meridian, Miss. ....	134	114	118

It will be seen by reference to the first table that the Commission did not condemn the rate from Cincinnati to Selma, and that it ordered a reduction of only 2 cents to Birmingham; that as to Atlanta, Rome, and Anniston the carriers subsequently reduced the rates from 107 to 98 cents, and as to Meridian from 122 to 106 cents, which latter reduction is 8 cents lower than the Commission ordered; and that the rates to Chattanooga and Knoxville are still 76 cents, as they were in 1894, when the former cases were decided.

The second table shows reductions from Chicago to every one of the southern destinations named, ranging from 5 cents to Chattanooga and Knoxville, Selma and Birmingham, to 16 cents to Meridian, and 14 cents to Atlanta, Rome, and Anniston. While these voluntary reductions in most instances show substantial and material action in the direction of the order of the Commission, they show but slight relief as to Chattanooga on shipments from Chicago and none at all on shipments from Cincinnati. They to my mind also largely refute the contention that no change can be made in the rates to Chattanooga without corresponding changes to all points throughout southern territory.

Although there was a distinct charge in the *Chicago case* that the rates were unreasonable both from Chicago and Cincinnati, it is said in the report, in referring to the former cases, that—

the gravamen of the complaint in both cases was that rates upon the numbered classes from the central west represented by Cincinnati and Chicago to various points of consumption in the south were too high, as compared with rates upon the same classes from points of origin in the east to the same destinations. These rates were made by the Southern Railway & Steamship Association, and the theory of the complainants was that the members of this association were jointly responsible for the rates established by the association, and that, therefore, if an undue preference was created by such rates in violation of the third section the Commission might by its order direct the various defendants to cease and desist from such violation of law.

The present report in effect thus apparently treats the allegation of unreasonableness of the rates in the old Chicago complaint as merely incidental to what is asserted to be the gravamen of the complaint in the present cases. This theory is neither justified by those proceedings nor by the facts presented therein, nor is it true that the complainants then relied only upon comparisons of rates and distances from the east and from the west to these southern points. They relied largely upon a comparison of rates in southern territory with those north of the Ohio River and a comparison of conditions, such as relative density of traffic, etc., and of earnings of these respective carriers, and the conclusion of the Commission that the rates from Chicago and Cincinnati to the southern points therein involved were unreasonable because of the excessive charges from the river south, was based largely upon these latter comparisons.

There is also an apparent purpose to excuse the defendants in withholding from the Commission in the former cases the information they now largely rely upon to impel a different conclusion. This appears in part, as I understand it, from the following language:

In the original case the operations of the Southern Railway & Steamship Association were mainly relied upon by the complainants to establish a ground for relief. It was claimed that this association was virtually a conspiracy in which eastern lines outvoted and outweighed western lines, and by which, therefore, an adjustment of rates was established and maintained which was unduly favorable to the stronger eastern lines. The proceedings of this association were all before the Commission and were fully considered. The exact theory upon which the Commission actually decided those cases does not seem to have been foreseen by either party upon the hearing, nor did the defendants apparently apprehend the importance which would be placed in the decision of the Commission upon this particular point, which was not, therefore, fully developed in the hearing before the Commission.

It also apparently is suggested that although the principal cause of the old complaint was the alleged discrimination in favor of the east on southern traffic because of alleged conspiracy of the eastern and Ohio River lines to the south, these defendants were not put upon sufficient notice to require of them a presentation of all the facts relating to the establishment and adjustment of these rates through the Southern Railway & Steamship Association. As a result we are to accept, it is proposed, subsequent statements regarding certain tariffs said to have been in effect some years prior to the passage of the Interstate Commerce law as conclusive that the defendants did not in fact carry out their openly avowed intention to promote a division of traffic between the eastern and western lines on the basis alleged. This suggestion is made, too, in face of the fact that in 1894, when the old decision was rendered, the rates were adjusted as between the numbered classes and the lettered classes substantially as alleged by complainants. In the old report, speaking as of that date, of course, it was said:

The fact, which clearly appears, that rates on the numbered classes from central territory are made higher than they otherwise would be, for the purpose of securing to the eastern lines the transportation of that traffic from the territory set apart to them under Southern Railway & Steamship Association agreement, itself raises a *prima facie* presumption of the unreasonableness of those rates.

The following quotations from the former report, which are in the nature of admissions of prominent traffic officials representing western and southern lines, to my mind are conclusive of the influence of eastern lines in preventing the western and southern carriers from charging rates which they have long believed the ends of justice require:

L. R. Brockenborough, general freight agent of the Chicago & Eastern Illinois Railway Company (whose road runs from Chicago to the Ohio at Evansville) stated that "his impression (is) that the general impression seems to be that the rates from central territory into southern territory are out of line with those from the seaboard," and that his road "would be willing to reduce its rate to bring the through rate in line with the New York rate." John C. Gault, general manager of the Queen & Crescent system (in which are defendants the Cincinnati, New Orleans & Texas Pacific and the Alabama Great Southern companies), stated that he "always thought rates from Chicago to southern points on higher classes ought to be the same as those from Boston and New York;" and that this "would not harm New York and hardly be enough in favor of the West." He also, under date of August 14, 1888, wrote to the commissioner of the Chicago Board of Trade, that "the roads interested in Chicago business ought in my (his) judgment to take such action as is necessary to insure a reduction of the rates" from the west. M. C. Markham, assistant traffic manager of the Illinois Central R. R. Co., testified that he had made an effort to have the Southern Railway & Steamship Association reduce the rates from central territory, and said: "Looking at the disparity between the rates from eastern and central territories, it appears there might be in them an element of unfairness to the latter. If it is true that rates from eastern territory into the southeast were made on account of water competition along the Atlantic seaboard, and if all rail lines leading from the east into that territory can afford to carry the goods for those rates made by water lines, then the western through lines could afford to carry for the same rates a less distance, provided all conditions governing the matter were equal." S. R. Knott, traffic manager of the Louisville & Nashville road, in a letter to G. J. Grammar of April 14, 1890, wrote that "While the adjustment may be unfair, as we think it is, yet it can hardly be said to be arbitrary or wholly unreasonable;" and that his company, "together with other lines interested in western traffic, then members of the Southern Railway & Steamship Association, urged a a modification of the difference" (between eastern and western rates) "and succeeded in having the matter brought, under the rules of the association, before the board of arbitration;" and that "the question was fully presented from both sides of the case and the decision of the board at that time (May, 1888) was that the best protection of all interests did not warrant the change in the adjustment of rates which we, with the other western lines, had requested; that is, changing the adjustment from Ohio River points and points north as compared with the rates from eastern cities." B. E. Hand, assistant general freight agent of the Michigan Central road, stated that he had made "repeated efforts with railroads operating in southern territory for a reduction of rates on manufactures from the west to the southeast." G. J. Grammar, chairman of the Central Traffic Association's committee on relations with southern roads, in a letter to N. G. Iglehart, of April 2, 1890, says: "All our efforts thus far have been unavailing to get the southern roads to more justly equalize the rates. You doubtless understand southern roads' rates from the Ohio River are arbitrary, their rates on all classes south-

bound being from 50 to 100 per cent greater per mile than by lines north of the river on similar traffic." In a letter, dated April 8, 1890, to S. R. Knott, he says: "The injustice of the present basis of rates" (from the Ohio) "must of necessity be apparent."

While conceding the accuracy of the rates shown in the report from Chicago-New York and Baltimore-Louisville to Chattanooga and Atlanta, respectively, with respect to this record, I can not agree that a basis is thus fixed upon which to find that a discrimination on the numbered classes from the west was not intended or that a practical division of territory between eastern and western lines was not made on that basis. The present report to a large extent practically seems to be based upon the alleged outcome in December, 1878, at Nashville, of one of the numerous conferences or conventions held by the Southern Railway & Steamship Association during the period of its existence and at a time when the carriers were not required by law to file, post, or maintain any established rates. From the record of the proceedings of that conference it appears that plans were proposed both by eastern and western representatives for a "practicable division of territory on certain articles, and the division was to be protected by certain differences in rates, by the respective lines, that were fixed by the convention." And in view of the statement in the report of the western representatives that "the western committee recognizes that the tariff which would result from exclusive eastern, exclusive western, and common articles as unusual and cumbersome, and *if it can be simplified consistently with all interests* they will approve such action," it by no means can be conclusively accepted that this suggestion related to the rate basis itself rather than to mere details of promulgating the classification. This view is borne out by the method of publishing rates from those sections then used, which required the letters "E," "W," or "C" after the rate to designate, respectively, whether the traffic was exclusively eastern, exclusively western, or common to both sections.

In addition to the resolutions introduced from time to time there are other evidences of intention and agreement to discriminate against the west. In a decision dated November 18, 1892, of the board of arbitration of the Southern Railway & Steamship Association, on a complaint involving the rate basis from certain points to the southeast, it is stated that—

In the relative adjustment between the east and west, the west, by reason of superior natural advantages in nearness to the raw material and cheaper food, is able to hold its preponderance in business at higher rates than the east.

Turning to the testimony of Mr. Peck, it is stated immediately following his statement of rates from Baltimore and Louisville to Atlanta, set out in the report, that—

It will be seen that the rates on all the numbered classes were made the same from both cities and that the western lines charged higher than Baltimore rates on all the

lettered classes except "e" and "g," which represented beer and pork and beef in barrels. To this extent, then, there was no preference to either the east or west or manufactured articles of any kind whatever. \* \* \* It is true that the rates from Cincinnati were made higher than those from Philadelphia, and the same is true of St. Louis and Chicago as compared with New York and Boston. So far as Cincinnati is concerned the completion of its railroad to Chattanooga put it on an equality with Louisville, so that its rates need not be further considered. It is true that the rates from St. Louis were made not only higher than New York, but at a higher rate per mile; but this was not caused by any demand of the eastern lines, but because of an expensive transfer on the short line, which justified a higher rate. It is also true that the Chicago rate was fixed at a higher rate per mile than the rate from Boston, though at a lower rate per mile than New York, its chief competitor, which had the same rate as Boston; but the western rates were fixed by the western lines, and if they favored the east it was not by reason of any demand or requirement of the eastern lines.

The Commission's former conclusions were not based upon mere supposition or conjecture, and even attaching to the action of the Nashville conference the import invoked by defendants, which, as I have suggested, is extremely doubtful, the mere expression of contemplated rightful doing and the filing of one schedule of rates certainly can not destroy the fact that rates were thereafter made substantially in accord with the intention expressed previous to the resolution referred to in the report. The Commission expressly found in its report of 1894 that—

The rates from Chicago to Chattanooga on the lettered classes are from 70 to 89 per cent of the New York rates, while on the numbered classes 1, 2, and 3, they are respectively 102, 101, and 95 per cent.

So far as the records of the Commission show, the class rates from the east to Atlanta and Chattanooga have never been changed except by the reduction of February 1, 1905. The Commission has compilations, however, of rates from Chicago to these points, an examination of which will show still greater preferences to the east on the numbered classes, especially during the decade 1880 to 1890. The present relation is substantially as it was in 1894.

I have suggested that complainants are entitled to greater relief than that proposed in the report. There is no doubt of the flourishing condition of the Cincinnati, New Orleans & Texas Pacific and in my mind none that it can operate with a reasonable profit under further reduced rates or that by such rates a hardship will be worked upon the carriers in the other and longer route between Cincinnati and Chattanooga. The Cincinnati, New Orleans & Texas Pacific is a leasing company, capitalized at \$5,500,000, consisting of \$2,500,000 preferred and \$3,000,000 common stock. The present rental of the Cincinnati Southern is slightly in excess of \$1,000,000 per annum. The history of this property is set out at some length in the report. Looking to a comparison of financial conditions it appears that for the years 1904, 1905, 1906, and 1907, gross earnings per mile from operations of the Cincinnati, New Orleans & Texas

Pacific and Southern Railways and Groups 1, 2, and 3 of the Commission's system of grouping for statistical purposes, were as follows:

	1904.	1905.	1906.	1907.
Cincinnati, New Orleans & Texas Pacific.....	20,193	21,730	24,965	25,831
Southern.....	6,295	6,687	7,273	7,506
Group 1.....	13,904	14,511	15,528	16,314
Group 2.....	20,187	20,752	22,517	23,538
Group 3.....	11,893	12,483	13,789	14,922

Groups 1, 2, and 3 include all of New England, New York, Pennsylvania, New Jersey, Delaware, Maryland, and a portion of West Virginia, also Ohio, Indiana, and the southern peninsula of Michigan, and are by far the greatest revenue producers. As to the other seven groups the Cincinnati, New Orleans and Texas Pacific produces in every case gross revenues per mile three to four times greater. It will be observed that the Southern Railway produces not one-third the gross revenue per mile of the Cincinnati Southern. The average gross earnings per mile of the railroads of the whole United States for the year 1906 was \$10,460. The density of traffic on the Cincinnati, New Orleans & Texas Pacific has gradually increased from two in 1894 to nearly three times in 1906 the average density of all the roads in the United States, and from 1904, when the density per mile of line about equaled the average in Group 2, which includes Delaware, New Jersey, Maryland, the greater part of Pennsylvania and New York, and a small portion of West Virginia, the increase on the Cincinnati, New Orleans & Texas Pacific has been gradual until in 1906 this road's density was materially greater than that of Group 2. During these years this line has consistently enjoyed about five times the density per mile of the Southern Railway, by which it is controlled. The increase in density of traffic on the Cincinnati Southern was 169 per cent greater in 1906 than in 1904, as compared with 115 per cent average increase of all roads in the United States during that period, or 54 per cent in favor of the Cincinnati, New Orleans & Texas Pacific in the matter of increase.

The following table shows number of tons of freight carried per mile of line by the Cincinnati, New Orleans & Texas Pacific as compared with the Southern Railway, Groups 2 and 3, and the average in the United States:

	1904.	1905.	1906.
Cincinnati, New Orleans & Texas Pacific.....	2,038,497	2,163,643	2,636,587
Southern.....	419,203	467,477	527,031
Group 2.....	2,059,168	2,200,372	2,443,924
Group 3.....	1,379,785	1,457,855	1,713,615
Average, United States.....	829,476	861,396	982,401



The ratio of expenses to operating income of the Cincinnati, New Orleans & Texas Pacific for 1904, 1905, and 1906 is shown in the following table, as well as a comparison with the Southern Railway and Groups 3 and 5, which groups cover the territory involved in these complaints:

	1904.	1905.	1906.
Cincinnati, New Orleans & Texas Pacific.....	73.41	73.65	72.98
Southern.....	70.30	69.90	71.35
Group 3.....	74.52	73.68	70.57
Group 5.....	70.66	71.34	73.04

For the years 1906-7 the net earnings of the Cincinnati, New Orleans & Texas Pacific were \$6,746 and \$5,769, respectively, per mile of line and of the Southern Railway \$2,084 in the former year and \$1,801 in the latter.

The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Decatur division \$25,227.72, and the Cincinnati to Louisville division \$24,618.15. The average of the whole system was lowered by numerous unprofitable branch lines, one of which earned only \$718.48. The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system. To a certain extent this is true, but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.

The gross earnings of the Nashville, Chattanooga & St. Louis in that year averaged \$9,882 per mile and the earnings of its main line from Hickman, Ky., to Chattanooga were \$20,295 per mile.

Numerous other statistics both from this record and from the Commission's files might be produced but I shall merely point out by way of comparison that the first class rate from New York to Chicago, a distance of about 900 miles, is 75 cents, or 1 cent less than the Cincinnati-to-Chattanooga rate for 336 miles, and the local first class rate from Chicago to Cincinnati, a distance of 298 miles, is 40 cents. Objection possibly will be made to this comparison because the carriers do not operate in the same general territory. The only object, however, in so confining a comparison is to consider the respective rates in the light of substantially similar circumstances and conditions of carriage. Reference to tables of earnings, density of traffic, etc., herein will show that these rates are made under transportation conditions less favorable in these respects than the rate from Cincinnati.

nati to Chattanooga. Only Group 2, embracing the eastern half of the New York-Chicago haul approximates the defendant's high standard of general transportation conditions, and Group 3 is far below that standard. Under these circumstances this comparison with the highly competitive Official Classification territory should go far toward convincing that the rates in issue are greatly in excess of a reasonable charge.

It is stated in the report that—

If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.

Plainly then some very substantial reasons should be advanced for denying the relief asked for, bearing in mind, of course, the general conditions in this territory and having due regard for the interests of other routes. This suggestion in my opinion is not met by apprehension of injustice to the Louisville & Nashville and Nashville, Chattanooga & St. Louis, whose financial condition is not shown to require less remedial action, or by the reasoning by which it is sought to show that the middle west magnifies its troubles or by which the eastern carriers are absolved from all responsibility for the existing conditions.

Much attention is devoted to water competition from the east. I do not say that the contention can be disregarded, but I am convinced that this plea, while practically always made in southeastern cases and, perhaps, as a general rule rightfully so, can be and is much abused in the extent to which invoked. It is suggested that because of general disregard of distance by water lines shorter rail routes are restricted in the amount of their charges. It is pointed out that for years the ocean route via Cape Horn from New York to San Francisco fixed the transcontinental rate between those points, although four times the distance. I do not dispute this, but I do earnestly suggest that free competition and the use of water and rail lines from the middle west to the southeast would doubtless have resulted in lower rates from the former section. If the water lines are to wipe out distance from the east, why should not the water and rail lines do this in the present instance from the west to the extent that genuine free competition, unhampered by unlawful traffic agreements, would do it? Comparative distances, such as cited in the report, based on the water lines' prorating mileages, should be accepted with some degree of caution when an undue disregard of mileage results, especially when a discriminatory arrangement of water and rail lines from the farther distant centers is proved or even reasonably

to be suspected. It should be stated also that Chattanooga is situated on the geographical line abolishing the differential between all-rail and rail-and-water rates from the east and should not be controlled by this competition to the same extent that points nearer the seaboard are.

The report also asserts that competitive conditions from the east have made the first class rate from that section lower than from Chicago and that the same forces reduce the lettered classes, which form the great volume of western traffic, from the west. Statistics are produced to show that during March and September, 1907, 63.07 per cent of the entire tonnage of the numbered classes into Chattanooga moved from north of the Ohio River and from Ohio River crossings via western lines, and that 65.36 per cent of the total volume of that traffic into southeastern territory was transported by those carriers—in other words, about twice the eastern tonnage. If competition is free and has operated in the manner suggested above from the east and on the lettered classes from the west, why has not its influence been felt in this increased volume of traffic which ordinarily would afford a most fruitful field for its exercise?

The present rate from Cincinnati and Louisville to Chattanooga has been in effect for twenty-eight years, notwithstanding the reduction from the east, but the suggestion is made that eastern lines are in no way responsible. I can not accept this for reasons which presently appear. While Chattanooga was not included in the general reduction in the class rates from the Ohio River to the southeast early in 1905, which included Atlanta, this rate was included with Atlanta in the general reduction from the east at about the time of the western readjustment. The report charges this eastern reduction to Chattanooga to the Norfolk & Western, and inferentially excuses the defendants from any responsibility in this respect. This position is not justified, as the Norfolk & Western rates from either section to Chattanooga can be made only with the consent of connections, in the present instance through Bristol with the Southern Railway, one of the defendants here. If the Southern Railway joins with the Norfolk & Western, surely it can not be said that the Norfolk & Western makes the reduction or is the controlling force any more than the Southern. It is needless to remark that I wholly disagree with the explanation of this rate from the east. Moreover, this eastern rate to Chattanooga was not made subsequent to the Atlanta rate, but our tariffs show both the Chattanooga and Atlanta rates as effective February 1, 1905, and if the proceedings of the New York convention of December, 1904, filed as an exhibit, are to be accepted the Southern Railway itself offered the motion that Chattanooga rates from the east should not exceed those to Atlanta. It further

appears that both the Southern Railway and the Cincinnati, New Orleans & Texas Pacific Railway were members of the committee that recommended no change in the rate from Louisville to Chattanooga in 1905.

In my view, the importance of the evidence before the Commission in the former cases, as to the manner in which and the purposes for which class rates from the west were made, is greatly minimized in the report, and notwithstanding the evidence withheld by the defendants and now for the first time presented, which, even if correctly interpreted in the report, is given undue weight in view of undisputed facts in the old record and of the whole situation, I am convinced that the rates involved were made and have been maintained higher than would have resulted but for the unlawful restraint of competition by the methods stated in the old report. Notwithstanding defendants' denial of the existence of an unlawful agreement prejudicial to the west, which plea seems to be accepted in the report, there can be no doubt that the admissions of the traffic representatives of the western and southern lines, herein quoted, even eliminating the other evidence from consideration, not only tend to show but do show, conclusively, to the contrary. That the Southern Railway has contributed to the discrimination against Chattanooga clearly appears. It may be, as the report states, "natural that the transportation lines from the east and the business houses in the east should exert themselves to maintain their hold upon this business," but this should be done by lawful means. As already stated, the present rates from Cincinnati to Chattanooga have been in effect for twenty-eight years, although Nashville, Atlanta, and other southeastern points have had relief, more or less justified in theory and in the degree extended in the different cases. Reductions to Chattanooga have been made from the east and in conjunction with one of the defendants in this proceeding. Looking to the history of the rates from these sections there is no doubt that as to Chattanooga from the west something is radically wrong, and in disposing of the complaint adequate relief should be given. I do not believe this would result in a wholesale disturbance of just rates to points throughout the south. So far as it would aid in the correction of unjust rates to other places the result is not to be deplored. Judged by any one of the considerations recognized either by the Commission or the courts in determining the reasonableness of transportation charges, the rates complained of exceed the limit of reasonableness to a greater extent than is declared in the report and should be dealt with accordingly.

I am authorized by Commissioner Lane to state that he concurs in these views.

## STATISTICS OF RAILWAYS IN THE UNITED STATES



# EXHIBIT "C"

INTERSTATE COMMERCE COMMISSION



111 And afterwards, to wit, on the first day of October, 1910, there was filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio, in said entitled cause, a certain demurrer of the Interstate Commerce Commission to the bill of complaint, in the words and figures following, to wit:

*Demurrer of the Interstate Commerce Commission.*

112 In the Circuit Court of the United States, Southern District of Ohio, Western Division.

In Equity. No. 6641.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers and Shippers Association of Cincinnati, Ohio, Complainants,

v.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

Demurrer of the Interstate Commerce Commission, One of the Above-named Defendants, to the Bill of Complaint of the Above-named Complainants.

*Demurrer.*

113 The Interstate Commerce Commission, one of the defendants in the above-entitled suit, by protestation, not confessing or acknowledging any of the matters or things in the bill of complaint of the above-named complainants contained to be true in such manner and form as therein set forth and alleged, demurs to said bill. And for cause of demurrer shows—

I.

That said complainants have not, in and by their said bill, shown any equity existing in them or in any of them.

II.

That said complainants have not, in and by said bill, shown that they are, or that any of them is, entitled to the relief or any of the relief prayed for by them in and by said bill.

III.

That said complainants have not, in and by said bill, shown that the legislative department of the Government of the United States



is or ever has been without power to grant the authority exercised by this defendant in making the order dated February 17, 1910, set forth in said complainants' said bill.

## IV.

That said complainants have not, in and by said bill, shown that said legislative department did not duly confer upon this defendant the authority exercised by this defendant in making said order.

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## V.

That said complainants have not, in and by said bill, shown that the subject-matter of said order is not within the jurisdiction conferred upon this defendant by said legislative department.

## VI.

That said complainants have not, in and by said bill, shown that in making said order this defendant exercised authority in excess of the authority conferred upon it by said legislative department.

## VII.

That said complainants have not, in and by said bill, shown that in making said order this defendant exercised unlawfully the authority or any of the authority conferred upon it by said legislative department.

## VIII.

That said complainants have not, in and by said bill, shown that in making said order this defendant violated any constitutional or other right of said complainants or any of said complainants, over which this court has or may exercise jurisdiction.

Wherefore and for divers other good causes of demurrer appearing in and by said bill this defendant demurs thereto and prays the judgment of this honorable court whether defendant shall be  
115 compelled to make any answer to the said bill or any part thereof.

INTERSTATE COMMERCE COMMISSION,  
By EDWARD A. MOSELEY, *Its Secretary*,  
SHERMAN T. McPHERSON,

*United States Attorney, Cincinnati, Ohio;*  
P. J. FARRELL,  
*Special Assistant United States At-*  
*torney, Washington, D. C.,*  
*Solicitors for Interstate Commerce Commission.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

P. J. FARRELL,  
*Solicitor for Defendant Interstate Commerce Commission.*

116     WASHINGTON,  
           *District of Columbia, ss:*

Edward A. Moseley, being first duly sworn, says on oath that he is the Secretary of the Interstate Commerce Commission, one of the defendants in the above-entitled suit, and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this 29th day of September, 1910.

[NOTARIAL SEAL.]

H. S. MILSTEAD,  
           *Notary Public.*

117     And afterwards, to wit, on the 4th day of October, 1910, there was filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio, in said entitled cause, a certain demurrer of the Cincinnati, New Orleans and Texas Pacific Railway Company to the bill of complaint, in the words and figures following, to wit:

*Demurrer of the Cincinnati, New Orleans & Texas Pacific Railway Company.*

118     Circuit Court of the United States, Southern District of Ohio,  
           Western Division.

No. 6641.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers and Shippers Association of Cincinnati, Ohio, Complainants,

vs.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

The Demurrer of The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation, to the Bill of Complaint of James J. Hooker and Ezra E. Williamson, Respectively President and Secretary of the Receivers and Shippers Association of Cincinnati, Ohio.

This defendant by protestation, is not confessing or acknowledging any or all of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, and reserving to itself all benefit and manner of advantage by reason of the manifold in-

perfections and inconsistencies of the said bill of complaint  
119 and of the irrelevant and immaterial matter therein contained, demurs to the said bill, and for cause of demurrer shows that the complainants have not in and by said bill made or stated such a cause as entitled them in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any of such matters.

And for further cause of demurrer this defendant shows that in and by said bill of complaint it appears that said suit is brought by complainants on behalf of divers firms, persons, associations, corporations and members of various societies named in said bill, and that it does not appear by said bill that said persons or any of them, or if any which of them, are shippers of goods, wares and merchandise mentioned in the six classes of freight referred to in the said bill of complaint, and the rates whereon are claimed in said bill of complaint to be unreasonable, or that any of said persons, or if any which, are interested in the relief sought in said bill, and in that said bill fails to aver that each of said persons is interested in said relief sought in said bill of complaint.

And for further cause of demurrer this defendant shows that it appears in and by said bill that the said complainants have brought said suit in their official capacities as President and Secretary of the Receivers and Shippers Association of Cincinnati, Ohio, and that the said James J. Hooker and Ezra E. Williamson, complainants as aforesaid, are not personally interested in and have no personal claim to any portion of the relief sought in and by said bill, and are not members of or within the class of persons on whose behalf said bill is brought.

For a further and additional ground of demurrer this defendant assigns and says that this court has no jurisdiction of the subject-matter of the above cause.

Wherefore this defendant demurs to the said bill and to  
120 all matters and things therein contained, and prays the judgment of this court whether it shall be compelled to make any further or other answer thereto, and prays to be dismissed with its reasonable costs in this behalf sustained.

EDWARD COLSTON,  
GEO. HOADLY,

*Solicitors for Defendant The Cincinnati,  
New Orleans & Texas Pacific Railway  
Company.*

I certify that in my belief the foregoing demurrer of The Cincinnati, New Orleans & Texas Pacific Railway Company to the bill of complaint of James J. Hooker and Ezra E. Williamson, respectively, president and secretary of the Receivers and Shippers Association of Cincinnati, Ohio, is well founded in law and proper to be filed in the above case.

GEO. HOADLY,  
*Of Counsel for The Cincinnati, New Orleans  
& Texas Pacific Railway Company, Defendant.*

UNITED STATES OF AMERICA,  
*Southern District of Ohio,*  
*State of Ohio, Hamilton County, ss:*

Thomas C. Powell, being first duly sworn on oath says that he is the Vice-President of The Cincinnati, New Orleans & Texas Pacific Railway Company; that he has read the foregoing demurrer to the bill of complaint of James J. Hooker and Ezra E. Williamson, respectively, president and secretary of the Receivers and Shippers Association of Cincinnati, Ohio, in this suit, and that the same is not interposed for purposes of delaying said suit or other proceedings therein.

T. C. POWELL.

Sworn to before me and subscribed in my presence, this 23rd day of August, A. D. 1910.

[NOTARIAL SEAL.]

J. V. BRYANT,  
*Notary Public, Hamilton County, Ohio.*

121 And afterwards, to wit, on the 24th day of October, 1910, there was filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio, in said entitled cause, a certain motion, in the words and figures following, to wit:

*Motion to Consolidate.*

122 Circuit Court of the United States, Southern District of Ohio,  
 Western Division.

#6641.

JAMES J. HOOKER and EZRA E. WILLIAMSON, etc., Complainants,  
 vs.  
 MARTIN A. KNAPP et al., Defendants.

*Motion to Consolidate.*

Now come complainants herein and move the court to consolidate this action with case #6668 on this docket.

LITTLEFORD, JAMES, FROST AND FOSTER,  
*Solicitors for Complainants.*

123 And afterwards, to wit, on the 15th day of February, 1911, said cause having been transferred to the United States Commerce Court in accordance with Section 6 of the Act of Congress approved June 18, 1910, the originals of all papers, and a certified transcript of all record entries in the case or proceeding up to the time of transfer, were filed in the United States Commerce Court.

124 And on the same day, to wit, the 15th day of February, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Consolidating Nos. 5 and 6.*

125 In the United States Commerce Court.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, etc., Petitioners,

vs.

MARTIN A. KNAPP et al., Respondents.

On motion of solicitors for petitioners it is ordered: That this cause be consolidated with cause No. 6 on this docket.

MARTIN A. KNAPP,

*Presiding Judge.*

126 And on the 3d day of April, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Granting United States Leave to Intervene.*

127 In the United States Commerce Court.

No. 5.

JAMES J. HOOKER et al., Petitioners,

vs.

MARTIN A. KNAPP et al., Respondents.

No. 6.

EAGLE WHITE LEAD CO. et al., Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION et al., Respondents.

In this cause the United States moves the Court that it be permitted to intervene and to become a party defendant; and it appearing to the Court that the cause involves public interests, the motion is allowed, and the United States is made a party defendant accordingly, and it is granted thirty days within which to make defense, either by motion or answer, but defense shall be made in such time as not to delay a hearing of the cause.

MARTIN A. KNAPP,

*Presiding Judge.*

128 And afterwards, to wit, on the 2d day of May, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

*Motion of the United States to Dismiss the Petitions.*

129 In the United States Commerce Court.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers and Shippers Association of Cincinnati, Ohio, Petitioners,

v.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schraeder Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

Consolidated.

*Motion of the United States to Dismiss the Petitions.*

The Attorney General of the United States of America, in behalf of the United States, Intervener, moves the Court to dismiss the petitions upon the following grounds, viz:

130 (1) It appears from the petitions and each of them, and the exhibits referred to therein and attached thereto, that the same are not prepared in accordance with the statute in such case made and provided, in that they do not set forth briefly and succinctly the facts constituting the petitioners' causes of action and specifying the relief sought.

(2) For that the said petitioners have not in and by their said petitions set forth any cause of action existing in them or any of them; and have not in and by their said petitions shown that they

are, or any of them is, entitled to the relief prayed for, or any part of the same.

(3) Neither of the said petitions and the exhibits referred to therein and attached thereto states any cause of action, for that when the said petitioners invoked the action of the Interstate Commerce Commission to hear and determine their complaint, the Commission in hearing and determining the same, and in entering its order thereon, acted within the power conferred upon it by the statute in such case made and provided, and the petitions here filed with the exhibits attached set forth no sufficient basis to justify a disturbance of that order.

(4) It appears from the said petitions and the exhibits referred to therein and attached thereto that the petitioners seek here the same relief which they sought from and were denied by the Interstate Commerce Commission, when this Court has no jurisdiction or power to act for and instead of the said Commission, or to make orders and to establish rules regulating the conduct and business of common carriers subject to the Act to Regulate Commerce.

(5) This Court hath no jurisdiction to entertain the said petitions or either of them for that this Court hath no power to grant, at the instance of the petitioners, the prayers of the said petitions that the Court set aside and annul the order of the Interstate Commerce Commission in case No. 1542, or to reopen said case No. 131 1542, and proceed to the further determination thereof, or to act in any other of the matters and things for which relief is prayed.

(6) It appears from the said petitions and the exhibits referred to therein and attached thereto that the said petitioners have not shown that in making its said order the Interstate Commerce Commission violated any right of the petitioners, or any of them, protected by the Constitution of the United States, or of any other right of the said petitioners, or any of them, over which this Court may exercise jurisdiction.

(7) It appears from the said petitions and the exhibits referred to therein and attached thereto that the said petitioners have not shown that in making its said order the Interstate Commerce Commission exceeded any power or authority conferred upon it by the Act to Regulate Commerce.

(8) It appears from the said petitions and the exhibits referred to therein and attached thereto that this Court is without jurisdiction to entertain the subject matter thereof.

(9) That the said petitions are, and each of them is, in other respects, to be pointed out upon the hearing of this motion, too vague, indefinite, irregular and insufficient to entitle the petitioners to the relief prayed, or any part of the same.

Wherefore, The Intervener prays that its motion be sustained and that the petitions be dismissed at the petitioners' cost; and for such other and further action as may be appropriate.

GEO. W. WICKERSHAM,

*Attorney-General of the United States.*



132 And on the 19th day of May, 1911, being one of the days of the May session of the United States Commerce Court, 1911, in the proceedings thereof in said entitled cause consolidated with No. 6, before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

*Hearing on Demurrers and Motion to Dismiss.*

Said causes came on for hearing before the court on the demurrer of the Interstate Commerce Commission, the demurrer of the Cincinnati, New Orleans & Texas Pacific Railway Company, and the motion of the United States to dismiss; R. Walton Moore, Esquire, and Frank W. Gwathmey, Esquire, appearing in behalf of the Cincinnati, New Orleans & Texas Pacific Railway Company, respondent, and Francis B. James, Esquire, in behalf of the petitioners. Thereupon said causes were continued for further hearing on Monday, May 22, 1911.

133 And on the 22d day of May, 1911, being one of the days of the May session of the United States Commerce Court, 1911, in the proceedings thereof in said entitled cause consolidated with No. 6, before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

*Cause Taken Under Advisement.*

Said causes came on to be further heard on the demurrers of the Interstate Commerce Commission and the Cincinnati, New Orleans & Texas Pacific Railway Company and on the motion of the United States to dismiss the petitions; P. J. Farrell, Esq., appearing on behalf of the Interstate Commerce Commission, Francis B. James, Esq., on behalf of the petitioners and R. Walton Moore, Esq., on behalf of the respondent, The Cincinnati, New Orleans and Texas Pacific Railway Company. Thereupon the causes were taken under advisement by the court.

134 And afterwards, to wit, on the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain opinion and dissenting opinion in the words and figures following, to wit:

135 United States Commerce Court, May Session, 1911.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers and Shippers' Association of Cincinnati, Ohio, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Co., and The United States, Respondents.

Francis B. James for petitioner-.

R. Walton Moore, Frank W. Gwathmey, for Cincinnati, New Orleans & Texas Pacific Railway Co.

J. A. Fowler, Assistant Attorney General; Blackburn Esterline, Special Assistant Attorney General, for the United States.

P. J. Farrell for Interstate Commerce Commission.

[July 20, 1911.]

CARLAND, *Judge*:

In this opinion, for the sake of brevity, the Cincinnati, New Orleans & Texas Pacific Railway Co. will be abbreviated C., N. O. & T. P.; The Interstate Commerce Commission will be abbreviated Commission; the Louisville & Nashville Railway Co. will be abbreviated L. & N.; and the Nashville, Chattanooga & St. Louis Railway Co. will be abbreviated N., C. & St. L.

Petitioners are firms, partnerships, and corporations engaged in various kinds of mercantile, commercial, industrial, and manufacturing pursuits in Hamilton County, Ohio, and manufacture and produce goods, wares, and merchandise, and sell annually large quantities thereof of great value, alleged in the bill to be several hundred thousand dollars, to purchasers located at Chattanooga, Tenn., which said goods, wares, and merchandise are enumerated in the freight tariffs and classifications governing the same of the respondent, C., N. O. & T. P. Said petitioners have invested in building up and maintaining their respective lines of business an amount exceeding the sum of \$25,000,000.

The C., N. O. & T. P. is a corporation duly organized under the laws of the State of Ohio and is a common carrier engaged in the transportation of goods, wares, and merchandise by railroad from the city of Cincinnati, Ohio, to the city of Chattanooga, Tenn., the northern terminus of said C., N. O. & T. P. being at Cincinnati and the southern at Chattanooga.

On the 14th day of July, 1910, petitioners filed their bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, Western Division, for the purpose of obtaining a judgment of that court setting aside and annulling an order of the Commission dated February 17, 1910, but in fact rendered May 24, 1910, and which order is in the following language:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present rates of defendant the Cincinnati, New Orleans & Texas Pacific Railway Co. (lessee of the Cincinnati Southern Railway) for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., are, to the extent that said rates exceed the rates named in paragraph 3 hereof, unjust and unreasonable.

"2. It is ordered, That said defendant be, and it is hereby, notified and required to cease and desist, on or before the 15th day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting its present rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn.

"3. It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., which shall not exceed the following, in cents per 100 pounds, to wit:

Class .....	1	2	3	4	5	6
Rate .....	<u>70</u>	<u>60</u>	<u>53</u>	<u>44</u>	<u>38</u>	<u>29"</u>

The C., N. O. & T. P. and the Commission filed demurrers to the bill. Subsequently the case was transferred to this court under the provisions of section 6 of the act to create a Commerce Court and to amend the act entitled "An act to regulate commerce," and the cause has now been submitted for decision upon the bill and demurrers.

The bill of complaint is quite voluminous, consisting, exclusive of exhibits, of 66 printed pages. The material allegations, however, which in our judgment are necessary to be considered in order to dispose of the case may be stated briefly as follows:

In 1894 the Commission decided the cases of Cincinnati Freight Bureau v. C., N. O. & T. P., and Chicago Freight Bureau v. L. & N., et al. (6 I. C. C. Rep., 195). These proceedings had been instituted by the commercial interests of Cincinnati and Chicago for the purpose of correcting an alleged discrimination in rates upon the numbered classes from points of origin in the Central West as compared with rates from points of origin in the East, to southern territory. The complaint of the Chicago Freight Bureau alleged

that the rates for the transportation of freight from western  
137 to southern points upon the numbered classes from Cincinnati and other Ohio River crossings to southern points of destination were excessive, and that the rates from Chicago were

even more excessive. Under this allegation the Commission held that it might inquire into the inherent reasonableness of these rates, and proceeded to dispose of the case upon that ground. The Commission held that the rates from Cincinnati were too high and should be materially reduced. The following are the rates then in effect from Cincinnati to Chattanooga and those ordered by the Commission, showing the reductions made:

Classes .....	1	2	3	4	5	6
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Rates in effect.....	76	65	57	47	40	30
Reduced rates .....	60	54	40	30	24	22
Reductions .....	16	11	17	17	16	8

The order of the Commission, made in pursuance of this decision, was not complied with by the carriers, and the Commission thereupon instituted proceedings in the Circuit Court for the Southern District of Ohio to enforce obedience to its requirements. Such proceedings were had in that suit that the Supreme Court of the United States finally directed a dismissal of the bill of complaint upon the ground that the act to regulate commerce as it then stood conferred no authority upon the Commission to establish a rate for the future; that this order was in effect the fixing of a future rate and therefore without warrant of law, and void. (*I. C. C. v. C., N. O. & T. P.*, 167 U. S., 479.)

When the interstate commerce law was amended in 1906 by giving to the Commission power to fix and establish a rate for the future, the Receivers & Shippers Association of Cincinnati commenced proceedings before the Commission and against the C., N. O. & T. P. and the Southern Railway Co. for the purpose of obtaining the benefit of the holding of the Commission in the former case. As a result of a hearing had by the Commission in the proceedings last mentioned, the order complained of in this action was made.

It is claimed by the petitioners that the maximum rate fixed by said order is much too high and is extortionate, so much so that the Commission in making the order violated the fifth amendment to the Constitution of the United States, which prohibits the taking of private property without due process of law or without just compensation. While said order of the Commission was in full force and unsuspended in any way, the C., N. O. & T. P. put into effect a schedule of rates for the transportation of freight between Cincinnati, Ohio, and Chattanooga, Tenn., in accordance with the maximum fixed by the Commission, and said rates are still in force.

In the report of the Commission, which is made a part of said order, it is found as follows:

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."

This language of the report refers to the finding made by the

Commission in 1894, and the reflections made then by the Commission appear in the table heretofore mentioned in this opinion.

138 The bill in this case also alleges that if the schedule of rates fixed by the Commission in 1894 had been in force or had been applied during the years 1903 to 1908, both inclusive, the yearly average net profit of the C., N. O. & T. P. would have been 40.66 per cent. It also appears from the bill of complaint that the city of Cincinnati owns the line of railroad between the city of Cincinnati, Ohio, and the city of Chattanooga, Tenn., which is commonly known as the Cincinnati Southern, and now and during the times mentioned in the bill operated by the C., N. O. & T. P. The road originally cost the city of Cincinnati \$18,000,000, and the city subsequently spent for terminal facilities \$2,500,000, making a total cost of the Cincinnati Southern to the city of Cincinnati of \$20,500,000. The C., N. O. & T. P. leased this property, and is still leasing it, and the basis of rental returned to the city of Cincinnati prior to 1906 was 6 per cent, and 5 per cent subsequent to that date. The C., N. O. & T. P. owns its own equipment and never did have any interest in the Cincinnati Southern beyond the right to use the property under the terms of the leasehold. The capital stock of the C., N. O. & T. P. for the years 1903 to 1908, both inclusive, was \$5,000,000, divided into \$3,000,000 of common stock and \$2,000,000 of preferred stock, and about the year 1908 it increased its capital stock by adding \$500,000 of preferred stock, making its entire issued capital stock for 1908 \$5,500,000. The value of the property of the C., N. O. & T. P. between the years 1903 and 1908, both inclusive, was \$5,000,000, and after 1908 was \$5,500,000, and was all the property of the C., N. O. & T. P. devoted to and employed in the public service and use and for the public convenience.

The C., N. O. & T. P. is a single-track railroad from Cincinnati to Chattanooga, a distance of 336 miles, without branches, and has an average gross earning per mile of \$26.082.6%. The L. & N. runs from Cincinnati to Louisville, and from Louisville to Nashville, the distance from Cincinnati to Louisville being 114 miles and the distance from Louisville to Nashville being 185.9 miles. The distance from Cincinnati to Nashville via the L. & N. is thus shown to be 299.9 miles. Nashville is connected with Chattanooga by the N., C. & St. L., the distance from Nashville to Chattanooga being 151 miles, making the distance from Cincinnati to Chattanooga, via the L. & N. from Cincinnati to Louisville and Louisville to Nashville, and from Nashville to Chattanooga over the N., C. & St. L., 450.9 miles. The direct haul from Cincinnati to Chattanooga via the C., N. O. & T. P. is thus 114.9 miles shorter than the indirect haul via the L. & N. and the N., C. & St. L. by way of Louisville and Nashville. The average gross earnings, per mile, between Cincinnati and Chattanooga via the L. & N. and the N., C. & St. L. is \$25.593.40.

In view of the finding of the Commission heretofore mentioned, it necessarily follows that its order ought to have followed its findings, unless the reasons stated by the Commission for not doing so are valid. In this connection it must be remembered, however, that

the power to establish reasonable and just rates for the future for the transportation of freight by common carriers is vested by law in the Commission and no part thereof is vested in this Court, and this Court may not disturb the order complained of unless it can be clearly found that it conflicts with the provisions of the fifth amendment to the Constitution of the United States, providing the power conferred has been regularly exercised. The order of the Commission itself does not fix a schedule of rates to be put in effect by the C., N. O. & T. P., but simply fixes a maximum rate beyond which the railroad may not go. The railroad, however, upon the making of this order established the schedule of rates as high as the order would permit, and therefore it may be truly said that the schedule of rates put in effect by the railway company is the schedule of rates made by the Commission or at least authorized by it. All that this Court could do if it found the maximum schedule fixed by the Commission violated the constitutional rights of shippers over the C., N. O. & T. P. would be to set aside the order; but as the rates prescribed thereby have already gone into effect, and as this Court has no authority or power to establish rates or to order that any particular rate be put in effect, it necessarily results that the rates now in effect on the C., N. O. & T. P. would continue in effect unless changed by the carrier or the Commission. The carrier could change its rates if the order was set aside and even make them higher than they are now. The Commission could again investigate the matter and fix a new schedule of rates. So that it appears that all the shippers would gain in this litigation would be the vacation of the order, and if the court held that the rates permitted were so high as to be violative in a constitutional sense of the rights of the shippers then no doubt the Commission would not again establish such a high schedule of rates. But in any event if we should set aside the order on constitutional grounds the shippers would be obliged to go again to the Commission for relief. At first we were inclined to think that the result which would be obtained by a successful termination of this suit in behalf of the shippers would be so inconsequential as to render it unnecessary for this Court to take jurisdiction over the case, but upon further reflection it would seem that the shippers have the right to a judgment of this court as to whether or not the schedule of rates contained in the order complained of is so high as to be violative of the fifth amendment to the Constitution as to the difference between what the Commission found would be reasonable if they considered the C., N. O. & T. P. by itself and the maximum rates that were fixed. Then if the shippers again went before the Commission they would have the benefit of the judgment of this court upon that subject. And in that view we proceed to consider the question as to whether the reasons given by the Commission for not reducing the schedule of rates for the classes mentioned to the sums which the Commission found would be reasonable if the C., N. O. & T. P. should be considered by itself are valid.

It is claimed by the petitioners that the Commission, having found that the so-called 60-cent schedule would be reasonable for the C.,

N. O. & T. P. considered by itself, was bound to establish such schedule as the result of its finding, and that the Commission's establishing a higher schedule for the reasons mentioned in its report, while seemingly within its power to fix a reasonable rate, was really and in fact beyond its power, as the Commission had no right to take into consideration in fixing a higher schedule the matters which induced it to make the order which it did.

There are two questions which are presented to this court for decision: First. Are the reasons given by the Commission for the establishment of the schedule mentioned in the order valid, 140 or are they so outside and beyond the power of the Commission to fix a reasonable rate as to come within the rule that prohibits the Commission from fixing a rate for reasons which the Commission is not authorized to consider? (*Southern Pacific Co. v. I. C. C.*, 219 U. S., 433.) Second. Is it shown, beyond reasonable question, by the present record that the schedule of rates contained in the order of the Commission complained of clearly violates the fifth amendment to the Constitution of the United States by taking the property of petitioners without due process of law or without just compensation if the taking is for a public purpose?

It seems to have been decided in the case of *Board of Railroad Commissioners of the State of Kansas v. Symms Grocery Co. et al.*, 35 Pac., 217, that the shipper can not invoke these constitutional provisions for the reason that he is not obliged to ship; that he may utilize the rate prescribed or he may not. We are not impressed with the soundness of this decision. The logical result of such a holding as applied to the facts in the present case would be equivalent to saying to the shipper, "You may pay an unconstitutional rate or go out of business;" and we do not think that the protection of the Constitution is held on any such condition.

In stating the reasons which in the judgment of the Commission compelled it to take into account in fixing the schedule of rates which it did other considerations and other railroads than the C., N. O. & T. P., we can do no better than to quote from the report of the Commission, as follows:

"The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Co., but also with reference to other companies whose rates are necessarily affected by these; otherwise stated, the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company, just as it would be the misfortune of some other company if it could not show as favorable earnings.

"The rate from Cincinnati and Louisville to Chattanooga has been the same for the last 28 years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future. Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by a fixed differential



than from the Ohio River, and this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati.

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reductions to Chattanooga. Originally, the same rate had  
141 been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis & San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the east as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory. How far are we at liberty to consider all this in fixing a reasonable rate over the

Cincinnati, New Orleans & Texas Pacific? It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points.

"Some indignation was expressed by several witnesses upon the part of the city of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad that property was not more devoted to the interests of the city of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present, it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have

142 benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities, and the relation of rates would have continued the same. However this may be, the city has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital.

"In the Matter of Proposed Advances in Freight Rates (9 I. C. C. Rep., 382) the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the Spokane case (15 I. C. C. Rep., 376) the same subject was considered and the same conclusion reached. The last affirmation of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.* (15 I. C. C. Rep., 555), in which the rule is stated by Clark, Commissioner, as follows:

"In the Spokane case (15 I. C. C. Rep., 376) we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

"As before suggested, we can not, in determining competitive rates, select that railroad which is the shortest or most advantageously situated and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines."

"We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits.

"The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville & Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville,

Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$25,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile. Now, in adjusting the rates of the Louisville & Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section of the road by itself, or shall it establish a common rate for the whole?

"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line, for the branch-line business when it reaches the main line is surplus traffic, from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates upon the  
143 Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907 over two-thirds of the tonnage was delivered to it by its connections and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railroad but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profits of to-day might not be a deficit.

"The complainants urge that the Cincinnati Southern is really a part of the Southern Railway system. If it were so considered the gross earnings per mile of the entire system would be less than those of either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis.

"If these rates are to be established with reference to other rates in the vicinity it becomes pertinent to inquire how the present rates compare with other rates for similar distances in the South. Extensive tables have been furnished by the defendants instituting such comparisons, and these tables have been to some extent criticized and replied to by the complainants.

"It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the railroad commissions of most States in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances.

"The complainants call our attention to rates from Cincinnati to

Nashville. The distance is 300 miles and the rates are materially lower than those from Cincinnati to Chattanooga, being, first class, 53 cents as against 76 cents, and sixth class, 23 cents as against 30 cents. But this Commission has found (*Chamber of Commerce of Chattanooga v. Southern Ry. Co.*, 10 I. C. C. Rep., 111), and the Federal courts have found (*East Tenn., Va. & Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1.), that water competition influences these rates to Nashville. The rate from Cincinnati to an intermediate point where there is no water competition is higher in proportion to distance than those to Chattanooga. Thus the first-class rate from Cincinnati to Gallatin, 20 miles north of Nashville, is 78 cents.

"The complainant also refers to rates from Virginia cities to Atlanta which are less per ton-mile than those in question. But it is well understood that these rates are materially affected by water competition, and ordinarily the long-distance rate would be less per ton-mile than the rate for the shorter distance. If rates from Virginia cities south for distances of from 300 to 350 miles are examined, it will be found that they usually equal or exceed the Chattanooga rates.

"The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for lower rates; and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past railways  
144 have been able to introduce various economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight 1 mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices.

"We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive."

It appears from the findings of the Commission that it has always refused in the consideration of the reasonableness of a rate or rates to consider only the particular carrier making the same by itself, but on the contrary has always considered the rates in a particular territory or the rates of other carriers to be affected by the change of the particular rate or rates in question; and we think it fair to say that so far as the Commission is concerned there has been a uniform policy, public policy if you please, because the Commission represents the United States in so far as it acts within the scope of its delegated authority in the establishment of reasonable and just rates, to the effect that it will not fix rates or determine their reasonableness solely upon a consideration of the particular carrier whose rates are directly involved. We think this court may take judicial knowledge of the fact that the interstate rates prescribed for the transportation of freight by common carrier must necessarily be more or less interdependent, or at least be so related to each other that the rate-making power will not simply because it has the power fix a rate upon a single line of railroads which will necessarily disorganize established and reasonable rates on other railroads in the same territory. All rates

established in accordance with law are presumed to be just and reasonable. It is for this reason that the rates for the transportation of freight of other carriers in the same territory may be looked into as evidence of what should be a just and reasonable rate, providing conditions are similar. We can not as a court not vested with the power to fix rates say, beyond question, that the elements which the Commission took into consideration in fixing the schedule complained of were improper for the Commission to consider, and therefore can not conclude that the Commission based a schedule of rates upon improper grounds.

It was said by the Supreme Court in *Texas & Pacific Railway v. I. C. C.*, 162 U. S., 233.

"that the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations: that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers \* \* \*."

Under the second proposition we can not disturb the order of the Commission on the theory that it fixed rates so high as to be violative of the fifth amendment to the Constitution, unless it shall clearly appear to us that the constitutional rights of the ship-  
145 pers were invaded thereby. The fixing of the schedule of rates complained of was a legislative act.

*Munn v. Illinois*, 96 U. S., 113.

*Peil v. Chicago N. W. Ry. Co.*, 94 U. S., 164.

*Express Cases*, 117 U. S., 1.

*C. M., etc., Ry. v. Minnesota*, 134 U. S., 418.

*Reagan v. Farmers' Loan & T. Co.*, 154 U. S., 362.

*St. L. & S. F. Ry. Co. v. Gill*, 156 U. S., 649.

*C. N. O. & T. P. Ry. Co. v. I. C. C.*, 162 U. S., 184.

*T. & P. Ry. v. I. C. C.*, 162 U. S., 197.

*I. C. C. v. Cincinnati Ry. Co.*, 167 U. S., 479.

*Railroad Commission Cases*, 116 U. S., 307.

*Smyth v. Ames*, 169 U. S., 515.

*Chord v. L. & N. R. R. Co.*, 183 U. S., 483.

*Alpers v. City of San Francisco*, 32 Fed., 503.

*So. Pac. Co. v. R. R. Commissioners*, 78 Fed., 236.

*New Orleans Water Works Co. v. New Orleans*, 164 U. S., 471.

*Atlantic Coast Line v. North Carolina Corporation Com.*, 206 U. S., 1.

And while we are of the opinion that our power to review the order of the Commission fixing a schedule of rates is coextensive with the limits of the protecting shield of the Constitution, still it must clearly appear that such protection in some degree has been taken away.

The Commission found that the rates complained of were not clearly excessive. Much less are we able to find that the rates authorized by the Commission in the order complained of and which were a reduction of the former rates are clearly excessive. In making this statement we are fully aware of the allegation of the bill as to the net earnings of the C., N. O. & T. P., and the whole case as to the excessive feature of the rates fixed by the Commission is almost entirely based upon the earnings of the C., N. O. & T. P. While earnings may be considered in the fixing of a reasonable rate to be charged by a carrier for the transportation of freight, rates necessarily can not be based upon earnings alone. This is made clearly to appear when we consider that a just and reasonable rate is one which is just to the carrier and to the shipper. It is a rate which yields to the carrier a fair return upon the value of the property employed in the public service, and it is a rate which is fair to the shipper for the service rendered; and when this rate is established if it results in large profits to the carrier the carrier is fortunate in its business, and if it results in a loss of earning power so that the business of the carrier is unprofitable the carrier is unfortunate. But the rate may not be lowered or raised merely upon the ground that the carrier is either making or losing money, providing always the rate is a reasonable and just rate. Indeed, it has been held that the earning power of the rate is one of the least considerations in fixing a just and reasonable rate.

Canada Northern R. R. Co. v. International Bridge Co.,  
L. R. 8 App. Cases, 723.

Board of Railroad Comm. v. I. C. R. R. Co., 20 I. C. C.  
Rep., 181.

Being satisfied that the Commission did not err in taking into consideration the grounds they did in fixing their schedule of rates, and not being clearly satisfied that the rates themselves are so high as to violate the constitutional rights of the shippers, we are of the opinion that the bill must be dismissed.

And it is so ordered.

146     ARCHBOLD, *Judge*, dissenting.

There can be no serious question as to the conclusion which would have been reached by the Commission had they confined themselves to the determination of what was a just and reasonable rate from Cincinnati to Chattanooga by the Cincinnati Southern, without regard to the effect upon other roads. This was gone into at length in 1894, and the 60-cent schedule, which is now contended for, sustained. (*Freight Bureau v. Cin., N. O. & T. P. R. R.*, 6 Inter. Com. Com. Rep., 195.) But as the law then stood there was no authority in the Commission to fix future rates, and its action was therefore held of no effect. (*Inter. Com. Com. v. Cin., N. O. & T. P. R. R.*, 167 U. S., 479.) But even with the lapse of time and the change of conditions, the issue as is recognized by the Commission is the same, and the same conclusion would confessedly have been reached except as they were influenced by a regard for the necessities of other roads. "If it is our

duty," says Commissioner Prouty in the report, "to take this railroad by itself and to determine the reasonableness of these rates, by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case, and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission." Unfortunately, however, for the complainants this view did not prevail. It was contended by the railroad company that the rates should be fixed not only with reference to the final results to itself and its own financial necessities, but also with reference to other companies whose rates were necessarily affected thereby; or, in other words, that the Commission should establish rates which would be just and reasonable for the whole section of territory in issue, and that if a particular carrier was so situated that it could make a handsome profit it was to be recognized as a piece of good fortune with which the Commission was not to interfere. Adopting this view, which had also been followed in other cases (in re proposed advance in freight rates, 9 Inter. Com. Com. Rep., 382; *Spokane v. North Pac. R. R.*, 15 Inter. Com. Com. Rep., 376; *Kindel v. New York, New Haven & Hartford R. R.*, 15 Inter. Com. Com. Rep., 555), it was accordingly held that the reasonableness of the rate between points served by two or more lines could not be determined by reference to that line alone which was shortest and most favorably situated with respect to operation and earnings, and the rate limited thereby; but that the entire situation was to be considered, and a rate fixed which would be reasonable with respect to all the lines directly serving the points involved. That rates for similar distances on other lines similarly conditioned may be referred to, to assist in determining what is fair and reasonable in any case is clear. And it is no doubt proper also to take into account the effect on rates upon freight moving to and from other points beyond those immediately in view. But that, in my judgement, is as far as it is permitted to go. There is no right, as I look at it, to consider the effect of the rate or rates to be established on those of other roads, between the same points, or to maintain such rates at a figure which is necessary to meet the needs of those roads. And so far as the order of the Commission was induced by any such idea, it can not be sustained.

147 If the Cincinnati Southern was the only line from Cincinnati to Chattanooga the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. And if it was a line that was costly to build, or that could not be economically run, this would operate to increase the rates, and the shipper would have to pay, to correspond. But, on the other hand, if the reverse of this was true, and the road was neither an expensive one to construct, maintain, or run, the shipper would clearly be entitled to the benefit of these conditions and to the lower rates necessarily to ensue. So, also, if this favored road was the first in the field, and other roads had come in after it was built, it certainly would not be contended that with the introduction of new and additional facilities the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well



placed. It is not to be thought of that the construction of a second or third road should be made the basis for higher rates. The standard would be that of the original and most favored line. But what difference does it make whether the road which can afford the best rate is the first or the last to be built? It is the condition at the time the rate is fixed that controls. The shipper is entitled to the benefit of any advance in transportation facilities that may be made and is not to be tied down to the unprogressive and outdistanced past. The supposed advantage in competing lines between the same points becomes a detriment if rates are to be kept up to help the weakest road.

The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build, and the cost of operation and maintenance is high. But its net earnings are nevertheless large, amounting to some 44 per cent on the capital stock. The route between the same points by way of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis roads is a third longer, or 450 miles, and both of these roads have more or less unremunerative branch lines. And yet the Commission have not only put the two routes on an equality, but have even considered the influence of unprofitable branches, which have to be taken care of, fixing a rate which shall be fair for the whole system, and not simply for the immediate section of road which is involved. This, in my judgment, they had no right to do. The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just, by the consideration of what some other road, not so favorably situated, may need.

The order of the Commission, being based upon mistaken and erroneous grounds, is therefore invalid and should be so declared. (*Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S., 297; *Inter. Com. Com. v. Stickney*, 215 U. S., 98; *Southern Pacific Railway v. Inter. Com. Com.*, 219 U. S., 833.) And the case should be thereupon remanded to the Commission in order that a rate may be fixed which shall be just and reasonable as respects the respondent carrier, by whom the services are to be performed. This does not take from the Commission the right to say what that rate shall be. Much less does it involve the determination of the rate by the Court. It merely disposes of the rate which has been mistakenly made, as preliminary to a new consideration of it by the Commission upon correct and proper grounds. (*Cin., N. O. & T. P. R. R. v. Inter. Com. Com.*, 162 U. S., 181, 238, 239; *Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S., 297.)

I therefore dissent from the judgment of the court, sustaining the demurrer and dismissing the bill.

*Mack, Judge:*

I concur in the above dissent.

149 And on the same day, to wit, the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Dismissing Bill of Complaint.*

150 In the United States Commerce Court, May Session, 1911.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers and Shippers' Association of Cincinnati, Ohio, Petitioners,

VS.

INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Respondents.

This cause coming on to be heard on demurrer to and motion to dismiss the Bill of Complaint herein, and having been argued by counsel, Mr. Francis B. James appearing for petitioner, Mr. R. Walton Moore and Mr. Frank W. Gwathmey for the Cincinnati, New Orleans & Texas Pacific Railway Company, and Mr. P. J. Farrell for the Interstate Commerce Commission, and upon due consideration thereof, it is now this 20th day of July, 1911, ordered, adjudged and decreed that the Bill of Complaint herein be and the same is hereby dismissed with costs.

By the Court:

MARTIN A. KNAPP,  
*Presiding Judge.*

151 And afterwards, to wit, on the 31st day of July, 1911, came the petitioners, by their solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain petition for appeal, in the words and figures following, to wit:

*Petition for Appeal.*

152 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of The Receivers & Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg, as President of The Receivers & Shippers' Association of Cincinnati, Ohio, Successor to said James J. Hooker as President of The Receivers & Shippers' Association of Cincinnati, Ohio, Petitioners,

VS.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as Members Composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer, as Members of the Interstate Commerce Commission, Charles C. McCord, being Successor to Martin A. Knapp, and Balthasar Henry Meyer, Being Successor to Francis M. Cockrell, as Members of the Interstate Commerce Commission; the Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and the United States of America, Respondents.

Petition for Appeal from the United States Commerce Court to the Supreme Court of the United States.

The above named petitioners conceiving themselves and each of them aggrieved by the order, judgment and decree made and entered on the 20th day of July, 1911, in the above entitled cause, do hereby appeal from said order, judgment and decree to the Supreme Court of the United States for the reasons specified in

153 the Assignment of Errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was made, duly authenticated, or in lieu thereof as may be directed by this court, the original record be transmitted on appeal instead of a transcript thereof as provided for in Section 2 of the Act of June 18, 1910, creating the Commerce Court and defining its powers and jurisdiction, duly authenticated, may be sent to the Supreme Court of the United States.

Wherefore, the petitioners pray that said order, judgment and decree may be reversed and that said court may be directed to enter

an order, judgment and decree in accordance with the prayer of the Bill.

FRANCIS B. JAMES,  
*Of Counsel for Petitioners.*

LITTLEFORD, JAMES, FROST & FOSTER,  
#1002-3-4-5 *First National Bank Building,*  
*Cincinnati, Ohio, Solicitors.*

Dated this 31st day of July, 1911.

The foregoing claim of appeal is allowed.

By the Court:

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,  
*Presiding Judge of the United*  
*States Commerce Court.*

Dated this 31st day of July, 1911.

154      And on the same day, to wit, the 31st day of July, 1911,  
came the petitioners, by their solicitors, and filed in the clerk's  
office of the United States Commerce Court, in said entitled cause,  
their certain assignment of errors, in the words and figures following,  
to wit:

*Assignment of Errors.*

155 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of The Receivers & Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg, as President of The Receivers & Shippers' Association of Cincinnati, Ohio, Successor to said James J. Hooker as President of The Receivers & Shippers' Association of Cincinnati, Ohio, Petitioners,

vs.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as Members Composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer, as Members of the Interstate Commerce Commission, Charles C. McCord, Being Successor to Martin A. Knapp, and Balthasar Henry Meyer, Being Successor to Francis M. Cockrell, as Members of the Interstate Commerce Commission; the Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and the United States of America, Respondents.

Assignment of Errors on Appeal from the United States Commerce Court to the Supreme Court of the United States.

The petitioners and each of them pray an appeal from the final order, judgment and decree of this court to the Supreme Court of the United States, and assign for errors:

First. The court erred in sustaining the demurrer to the Bill and dismissing the Bill.

156 Second. The court erred in not overruling the demurrer to the Bill.

Third. The court erred in sustaining the motion to dismiss the Bill.

Fourth. The court erred in not overruling the motion to dismiss the Bill.

Wherefore, the petitioners pray that said order, judgment and decree may be reversed and that said court may be directed to enter an order, judgment and decree in accordance with the prayer of the Bill.

FRANCIS B. JAMES,  
*Of Counsel for Petitioners.*

LITTLEFORD, JAMES, FROST & FOSTER,  
#1002-3-4-5 First National Bank Building,  
Cincinnati, Ohio, Solicitors.

157 And on the same day, to wit, the 31st day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Allowing Appeal.*

158 UNITED STATES OF AMERICA:

In the United States Commerce Court.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of The Receivers' & Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg, as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, Successor to said James J. Hooker as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, Petitioners,

vs.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as Members Composing the Interstate Commerce Commission, and Charles C. McChord and Balthasar Henry Meyer, as Members of the Interstate Commerce Commission, Charles C. McChord Being Successor to Martin A. Knapp and Balthasar Henry Meyer Being Successor to Francis M. Cockrell as Members of the Interstate Commerce Commission; The Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

In this cause, the above named petitioners, by their solicitor, Francis B. James, having made their application in writing for an appeal from the decree therein rendered on the 20th day of July, 1911, to the Supreme Court of the United States, it is, therefore, ordered, that said appeal be, and the same is hereby, granted, allowed and made returnable on the 30th day of August, 1911.

MARTIN A. KNAPP,

*Presiding Judge United States Commerce Court.*

159 And afterwards, to wit, on the 26th day of August, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain bond, in the words and figures, following to wit:

*Appeal Bond.*

160 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg, as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, Successor to said James J. Hooker, as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, Petitioners,

vs.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as Members Composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer, as Members of the Interstate Commerce Commission, Charles C. McCord Being Successor to Martin A. Knapp and Balthasar Henry Meyer Being Successor to Francis M. Cockrell as Members of the Interstate Commerce Commission; The Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

Bond on Appeal from the United States Commerce Court to the Supreme Court of the United States.

Know all men by these presents, That we, James J. Hooker and Ezra E. Williamson, respectively President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, successor to said James J. Hooker as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, as principals, and Fidelity & Deposit Company of Maryland, a corporation duly organized under the laws of said State, as  
 161 surety, are held and firmly bound unto Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark as members composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer as members of the Interstate Commerce Commission, Charles C. McCord being successor to Martin A. Knapp, and Balthasar Henry Meyer being successor to Francis M. Cockrell as members of the Interstate Commerce Commission; the Interstate Commerce Commission, the Cincinnati, New Orleans and Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and the United States of America



in the full and just sum of five hundred (\$500.00) dollars, to pay to said Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark as members composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer as members of the Interstate Commerce Commission, Charles C. McCord being successor to Martin A. Knapp and Balthasar Henry Meyer being successor to Francis M. Cockrell as members of the Interstate Commerce Commission, the Interstate Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and the United States of America, their certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns jointly and severally by these presents. Signed with our names and sealed with our seals and dated this 31st day of July in the year of our Lord one Thousand nine hundred and eleven.

Whereas, lately at the United States Commerce Court for the 20th day of July, 1911, in a suit pending in said court, between  
 162 James J. Hooker and Ezra E. Williamson, respectively as President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, successor to said James J. Hooker as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark as members composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer as members of the Interstate Commerce Commission, Charles C. McCord being successor to Martin A. Knapp, and Balthasar Henry Meyer being successor to Francis M. Cockrell as members of the Interstate Commerce Commission, the Interstate Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company and the United States of America an order, judgement and decree was rendered against said James J. Hooker and Ezra E. Williamson, respectively President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, successor to said James J. Hooker as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, and said James J. Hooker and Ezra E. Williamson, respectively President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, successor to said James J. Hooker as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, having obtained an appeal and filed the original and a copy thereof in the Clerk's Office of the said Court to reverse said order, judgement and decree in the afore-said suit, and a citation directed to the said Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark as

members composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer as members of the Interstate Commerce Commission, Charles C. McCord being successor to Martin A. Knapp and Balthasar Henry Meyer being successor to Francis M. Cockrell as members of the Interstate Commerce Commission, the Interstate Commerce Commission, The Cincinnati, New Orleans and Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and the United States of America citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the — day of —, 1911, next.

Now the condition of the above obligation is such that if the said James J. Hooker and Ezra E. Williamson, respectively President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, successor to James J. Hooker as President of The Receivers' and Shippers' Association of Cincinnati, Ohio, shall prosecute their appeal to effect and answer all costs and damages, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

JAMES J. HOOKER, [SEAL.]

EZRA E. WILLIAMSON, [SEAL.]

RECEIVERS' & SHIPPERS' ASS'N, [SEAL.]

MAURICE J. FREIBERG, [SEAL.]

JAMES J. HOOKER, [SEAL.]

EZRA E. WILLIAMSON, AND, [SEAL.]

MAURICE J. FREIBERG, [SEAL.]

*On Behalf of* [SEAL.]

THE RECEIVERS' & SHIPPERS' [SEAL.]

ASS'N, [SEAL.]

By FRANCIS B. JAMES, [SEAL.]

*Solicitor, Attorney & Counsel,*

FIDELITY & DEPOSIT CO. OF [SEAL.]

MD.,

By PAUL M. MILLIKIN, *Attorney-in-Fact,*

Signed, sealed and delivered in presence of:

— — —  
— — —

Approved by the Court:

R. W. ARCHIBALD,

*Associate Judge of the United  
States Commerce Court,*

UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of The Receivers' & Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg, as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, Successor to said James J. Hooker as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, Petitioners,

VS.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as Members Composing the Interstate Commerce Commission, and Charles C. McChord and Balthasar Henry Meyer, as Members of the Interstate Commerce Commission, Charles C. McChord Being Successor to Martin A. Knapp and Balthasar Henry Meyer Being Successor to Francis M. Cockrell as Members of the Interstate Commerce Commission; The Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

To the clerk of said court:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal of the above named petitioners, and include in said transcript the following pleadings, proceedings and papers on file or of record, to-wit:

165 Bill of Complaint (U. S. Circuit Court, Southern District of Ohio—Equity No. 6641), filed July 14, 1910.

Demurrer of the Interstate Commerce Commission to Bill of Complaint, filed Dec. 1, 1910.

Demurrer of Cincinnati, New Orleans and Texas Pacific Ry. Co., filed Oct. 4, 1910.

Motion to consolidate this cause with cause #6668, filed Oct. 21, 1910.

Order entered by U. S. Commerce Court consolidating this cause with Suit No. 6, filed Feb. 15, 1911.

Order permitting United States to intervene and granting 30 days to make defense, filed Apr. 3, 1911.

Motion of the United States to dismiss the petitions, filed May 2, 1911.

Order entered dismissing bill of complaint with costs, filed July 20, 1911.

Opinion and dissenting opinion, filed July 20, 1911.

Petition for appeal, assignment of errors, order allowing appeal, citation on appeal, of petitioners, filed July 31, 1911.

FRANCIS B. JAMES,  
*Solicitor for Petitioners.*

July 31, 1911.

166 In the United States Commerce Court.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers' and Shippers' Association of Cincinnati, Ohio, Petitioners,

vs.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and the Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Respondents.

DISTRICT OF COLUMBIA, ss:

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 165, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the præcipe filed in the clerk's office of said court on the 31st day of July, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 30th day of August, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk,*  
By W. S. HINMAN,  
*Deputy Clerk.*

Filed Jul-31, 1911. United States Commerce Court. G. F. Snyder,  
Clerk.

167 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of The Receivers' & Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg, as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, Successor to said James J. Hooker as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, Petitioners,

VS.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as Members Composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer, as Members of the Interstate Commerce Commission, Charles C. McCord Being Successor to Martin A. Knapp and Balthasar Henry Meyer Being Successor to Francis M. Cockrell as Members of the Interstate Commerce Commission; The Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

*Citation to Appellees on Appeal from the United States Commerce Court to the Supreme Court of the United States.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States to Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, as members composing the Interstate Commerce Commission, and Charles C. McCord and Balthasar Henry Meyer, as members of the Interstate Commerce Commission, Charles C. McCord being successor to Martin A. Knapp and Balthasar Henry Meyer being successor to Francis M. Cockrell as members of the Interstate Commerce Commission; The Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and the United States of America, Greeting:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, within thirty (30) days  
168 after the date of this writ and citation, pursuant to an appeal allowed by the United States Commerce Court and filed in the

Clerk's Office of the United States Commerce Court, in the District of Columbia, on the 31st day of July, 1911, in a cause wherein James J. Hooker and Ezra E. Williamson, respectively President and Secretary of The Receivers' and Shippers' Association of Cincinnati, Ohio, and Maurice J. Freiberg as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, successor to said James J. Hooker as President of The Receivers' & Shippers' Association of Cincinnati, Ohio, are appellants and you appellees, to show cause, if any there be, why the order, judgment and decree rendered against said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 31st day of July, 1911.

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,  
*Presiding Judge of the United States Commerce Court.*

Service of the foregoing citation is hereby acknowledged this 31st day of July A. D. 1911.

BLACKBURN ESTERLINE,

*For the United States,*

F. W. GWATHMEY,

*For Cincinnati, New Orleans & Texas*

*Pacific Railway Company,*

CHAS. W. NEEDHAM,

*For the Interstate Commerce Commission and the Members Thereof.*

[Endorsed:] In Equity No. 5. United States of America. In the United States Commerce Court. James J. Hooker, et al., Petitioners, vs. Martin A. Knapp, et al., Respondents. Citation to Appellees on Appeal from the United States Commerce Court to the Supreme Court of the United States. Francis B. James, of counsel for petitioners. Littleford, James, Frost & Foster, Solicitors.

Endorsed on cover: File No. 22,849. United States Commerce Court. Term No. 773. James J. Hooker and Ezra E. Williamson, respectively president and secretary of The Receivers' & Shippers' Association of Cincinnati, Ohio, et al., appellants, vs. Martin A. Knapp et al., as members composing The Interstate Commerce Commission; The Interstate Commerce Commission; The Cincinnati, New Orleans & Texas Pacific Railway Company, and the United States of America. Filed September 5, 1911. File No. 22,849.

**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1911.**

**No. 774.**

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**THE EAGLE WHITE LEAD COMPANY, THE PETERS  
CARTRIDGE COMPANY, ET AL., APPELLANTS,**

**v/s.**

**THE INTERSTATE COMMERCE COMMISSION, THE CIN-  
CINNATI, NEW ORLEANS AND TEXAS PACIFIC RAIL-  
WAY COMPANY, AND THE UNITED STATES OF  
AMERICA.**

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**APPEAL FROM THE UNITED STATES COMMERCE COURT.**

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**FILED SEPTEMBER 5, 1911.**

**(22,850.)**





(22,850.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 774.

THE EAGLE WHITE LEAD COMPANY, THE PETERS  
CARTRIDGE COMPANY, ET AL., APPELLANTS,

*vs.*

THE INTERSTATE COMMERCE COMMISSION, THE CIN-  
CINNATI, NEW ORLEANS AND TEXAS PACIFIC RAIL-  
WAY COMPANY, AND THE UNITED STATES OF  
AMERICA.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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*a* United States Commerce Court.

No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; The Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Respondents.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that on the 24th day of October, 1910, came the petitioners in the above-entitled cause, by their solicitors, and filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio their certain bill of complaint and exhibits, in the words and figures following, to wit:

I UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Southern District of Ohio, Western Division Thereof.

No. 6668. In Equity.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Complainants,

vs.

THE INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the Court Afore-said:

Your orators, the Eagle White Lead Company, an Ohio corporation; The Peters Cartridge Company, an Ohio corporation; the Charles Boldt Company, an Ohio corporation; The Overman and Schrader Cordage Company, an Ohio corporation and Henry Ratterman and Theodore Luth, partners doing business as Ratterman and

Luth, the above named complainants, present this their Bill of Complaint on behalf of themselves and all persons, firms, partnerships, and corporations whose interests are common, like and similar or substantially similar and who are very numerous and too numerous to bring individual suits without a multiplicity of suits and manifest inconvenience and oppressive delay and that your orators are sufficient parties, to represent all interest adverse to defendants, and that complainants, and all others aforesaid on whose behalf this action is brought are hereinafter for brevity, calley "Parties Aggrieved" and thereupon aver:

2 (1) That this suit is of a civil nature and arises under the constitution and laws of the United States and that the matter and amount in dispute exceed, exclusive of interest and costs, the sum and value of two thousand (\$2,000) dollars.

(2) Your orators, the above named complainants, are and were at the times herein alleged citizens of the state of Ohio, residents and inhabitants of and domiciled in the city of Cincinnati, county of Hamilton, state of Ohio, within said Western Division of said Southern District of Ohio and complainants are and were at the times herein alleged corporations and partnerships respectively as above stated.

(3) That said parties aggrieved, including complainants and all others as aforesaid on whose behalf this action is brought are directly and immediately aggrieved, affected, damaged and injured by the order hereinafter complained of and are and were at the times herein alleged interested in and affected by the tariffs, rates and classification hereinafter referred to and engaged in various kinds of mercantile, commercial, industrial and manufacturing pursuits in said Hamilton County, State of Ohio, and manufacture and produce goods, wares and merchandise, enumerated in first, second, third, fourth, fifth and sixth classes of the Southern classification of goods, wares and merchandise hereinafter referred to and sell and sold at the times herein alleged annually large quantities thereof of great value, to-wit: greatly in excess of the value of several hundred thousand dollars, to purchasers located at Chattanooga, Tennessee, and that said goods, wares and merchandise are enumerated in the first, second, third, fourth, fifth and sixth classes of the Southern classification of goods, wares and merchandise hereinafter referred to, which said Southern classification is the classification adopted by defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company (herein abbreviated C. N. O. & T. P. Ry. Co.), and governs and governed at the times herein alleged the classified schedule of rates first to sixth classes both inclusive from Cincinnati, Ohio, to Chattanooga, Tenn., published in the freight tariffs of said C. N. O. & T. P. Ry. Co., and by it duly filed with defendant, The Interstate Commerce Commission.

That they have invested large sums of money in building up and maintaining their respective lines of business in an amount exceeding the sum of twenty-five million (\$25,000,000) dollars.

3 (4) That the Interstate Commerce Commission, (herein abbreviated "Commission,") has been created and established and during all the times herein mentioned has existed and

still exists, under and by virtue of an Act of Congress of the United States, entitled: "An Act To Regulate Commerce," approved February 4, 1887, and the acts amendatory thereof and supplemental thereto; it is in substance a body corporate and subject to suit as defendant herein, and is now composed of Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, who are the members composing the said Interstate Commerce Commission.

(5) That said C. N. O. & T. P. Ry. Co. is a corporation, duly organized under the laws of the State of Ohio and has its principal operating office in the said city of Cincinnati, county of Hamilton, state of Ohio, within said Western Division of said Southern District of Ohio; that said C. N. O. & T. P. Ry. Co. is a common carrier, engaged in the transportation of goods, wares and merchandise by railroad from said city of Cincinnati, Ohio to said city of Chattanooga, terminus, that said two points constituting the only termini of said road, and that the city of Chattanooga, Tennessee, is the southern terminus, that said two points constituting the only termini of said road and the distance by said road from said Cincinnati, Ohio, to said Chattanooga, Tennessee, is 336 miles; that said C. N. O. & T. P. Ry. Co. is a common carrier of Interstate Commerce between said city of Cincinnati, Ohio and said city of Chattanooga, Tennessee, and is in all respects subject to the provisions of said Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplemental thereto;

That said C. N. O. & T. P. Ry. is a single trunk line without branches and running from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee, and it and its operation is entirely distinct from any other railroad or railroad company.

(6) That said parties aggrieved, including complainants and all others as aforesaid on whose behalf this action is brought ship now and shipped as interstate commerce at all times herein alleged said goods, wares and merchandise enumerated in said first, second, third, fourth, fifth and sixth classes as aforesaid over said road of said C. N. O. & T. P. Ry. Co. from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee.

(7) That said C. N. O. & T. P. Ry. Co. at the times herein alleged duly published and duly filed with said Commission a schedule of freight rates on goods, wares and merchandise within said six classes for the transportation over its said road of said goods, wares and merchandise from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee, which are and were for said classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	76	65	57	47	40	30

Hereinafter for brevity called "76 cent schedule."

(8) That said schedule of rates for said classes set forth in paragraph — (7) hereof are extortionate, excessive, unjust and unreasonable, and that taking said C. N. O. & T. P. Ry. Co. by itself, and taking into consideration the cost of construction, the cost of mainte-

nance and profit upon the investment, the said schedule of rates for said classes set forth in paragraph — (7) hereof are extortionate, excessive, unjust and unreasonable for the transportation of said goods, wares and merchandise over said C. N. O. & T. P. Ry. from said City of Cincinnati, Ohio, to said city of Chattanooga, Tennessee.

(9) That on November 24, 1894, the Interstate Commerce Commission in case No. 322, Cincinnati Freight Bureau vs. C. N. O. & T. P. Ry. Co., and in case No. 323, Chicago Freight Bureau vs. L. N. A. & C. Ry. Co. on complaint made, duly reported and found that said rates as set forth in paragraph seven (7) herein from Cincinnati, Ohio, to Chattanooga, Tennessee, were unjust and unreasonable and that just and reasonable maximum freight rates would and should be for said classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

Hereinafter for brevity called "60 cent schedule."

(10) That the city of Cincinnati at all of the times herein alleged owned said line of railroad between said city of Cincinnati, Ohio, and Chattanooga, Tennessee, and which is and was at the times herein alleged operated by said C. N. O. & T. P. Ry. Co., that said road was constructed by said city of Cincinnati, Ohio, and opened for business about the year 1880; that the original cost of said railroad was \$18,000,000, and that the city of Cincinnati subsequently expended in terminal facilities about \$2,500,000, making a total cost of said railroad to said city of Cincinnati \$20,500,000.

5 (11) That said railroad at all the times herein alleged and at the present time was and is leased by said city of Cincinnati to said The C. N. O. & T. P. Ry. Co. and that the rental of the same for a number of years prior to 1906 was \$1,250,000 per year, or a return of about six per cent. per annum to said city of Cincinnati upon the cost of said property; that the rental paid and to be paid by said C. N. O. & T. P. Ry. Co. to said city of Cincinnati during the first twenty years of a sixty-year lease from 1906 is \$1,050,000 per year and somewhat more for the balance of forty years of said term, thus yielding a return to said city of Cincinnati, Ohio, in excess of five per cent. per annum upon the cost of said property.

(12) That the city of Cincinnati, Ohio, has for some time last past paid three and a half per cent. per annum upon bonds for money borrowed for the construction of said railroad and the building of said terminus and it is now and has for some time last past cleared a profit of one and one-half per cent. per annum upon its investment.

(13) That said C. N. O. & T. Ry. Co. owns its own equipment and has not now and never did have any interest in said property leased by it from said city of Cincinnati, Ohio, beyond the right to use said property for railroad purposes for the aforesaid terms.

(14) That the capital stock of said C. N. O. & T. P. Ry. Co. for the years 1903 to 1908 inclusive was \$5,000,000, divided into \$3,000,000 common stock and \$2,000,000 preferred stock; about the



year 1908 the said C. N. O. & T. P. Ry. Co. added to its preferred stock \$500,000, making the total capital stock of said C. N. O. & T. P. Ry. Co. between 1908 and the present time \$5,500,000.

(15) That the value of all the property of said C. N. O. & T. P. Ry. Co. between 1903 and 1908 inclusive was \$5,000,000 and between 1908 and the present time \$5,500,000, and that during said respective periods was all the property which said C. N. O. & T. P. Ry. Co. devoted to and employed in the public-service and use, and for the public convenience.

(16) That the number of tons of freight hauled; the number of tons of freight hauled one mile and the number of tons of freight hauled one mile per mile of road by said C. N. O. & T. P. Ry. Co. over said road between the years 1884 and 1908, both inclusive were as follows:

6

Year.	Number tons freight hauled.	Number tons freight hauled one mile.	Number tons freight hauled one mile per mile road.
1884 .....	917,292	166,453,790	495,398
1885 .....	979,421	179,614,266	534,566
1886 .....	1,169,699	210,274,950	625,818
1887 .....	1,421,341	247,409,159	736,336
1888 .....	1,576,340	291,132,332	875,393
1889 .....	1,737,060	298,910,667	889,615
1890 .....	1,923,306	332,873,387	990,694
1891 .....	2,004,418	354,572,982	1,055,276
1892 .....	2,181,426	407,754,394	1,213,527
1893 .....	2,110,679	407,968,022	1,214,190
1894 .....	1,765,437	330,415,184	986,354
1895 .....	1,934,238	348,404,084	1,036,321
1896 .....	2,109,147	355,048,601	1,056,692
1897 .....	2,063,492	354,445,485	1,054,897
1898 .....	2,458,762	423,425,738	1,260,195
1899 .....	2,763,546	481,694,704	1,433,615
1900 .....	3,192,020	540,379,661	1,608,272
1901 .....	2,998,020	506,708,131	1,508,059
1902 .....	3,477,448	601,185,071	1,789,241
1903 .....	3,834,141	662,589,351	1,974,992
1904 .....	3,860,712	688,461,807	2,048,993
1905 .....	4,026,287	730,727,269	2,174,783
1906 .....	4,905,687	890,454,630	2,650,162
1907 .....	4,852,253	856,922,467	2,550,364
1908 .....	4,299,008	775,962,245	2,309,411

(17) That the gross earnings; the gross earnings per mile and the receipts per ton per mile in cents, of said C. N. O. & T. P. Ry. Co. between the years 1884 and 1908, both inclusive, were as follows:

Year.	Gross earnings.	Gross earnings per mile.	Receipts per ton per mile. Cents.
1884	\$2,658,184	\$7,911.26	1.10
1885	2,681,547	7,980.79	1.03
1886	2,882,171	8,577.89	.99
1887	3,377,551	10,052.24	.99
1888	3,624,490	10,787.17	.89
1889	3,665,859	10,883.12	.89
1890	4,309,144	12,824.83	.92
1891	4,379,143	13,033.16	.88
1892	4,337,498	12,909.22	.78
1893	4,174,970	12,425.51	.74
1894	3,576,979	10,645.77	.76
1895	3,487,942	10,380.78	.72
1896	3,685,865	10,969.83	.73
1897	3,440,506	10,239.60	.72
1898	4,128,118	12,286.07	.70
1899	4,691,232	13,962.00	.68
1900	5,124,241	15,250.72	.73
1901	5,045,596	15,016.65	.74
1902	5,660,404	16,846.44	.71
1903	6,155,454	18,319.81	.71
1904	6,768,744	20,145.07	.75
1905	7,358,618	21,905.86	.73
1906	8,454,896	25,163.38	.72
1907	8,763,773	26,082.66	.76
1908	7,801,378	23,434.62	.76

(18) That the net earnings and the net earnings per mile of said C. N. O. & T. P. Ry. Co. from the operation of said road between the years 1884 and 1902, both inclusive, were as follows:

8

Year.	Net earnings.	Net earnings per mile.
1884	\$904,010	\$2,690.51
1885	1,064,811	3,169.08
1886	1,128,292	3,358.01
1887	1,342,979	3,996.96
1888	1,204,954	3,856.17
1889	1,145,256	3,409.32
1890	1,580,963	4,705.24
1891	1,354,640	4,031.66
1892	1,137,688	3,385.98
1893	998,715	2,972.37
1894	911,764	2,713.58
1895	976,787	2,907.05
1896	1,039,992	3,095.21
1897	1,097,325	3,265.85
1898	1,549,682	4,612.15
1899	1,739,006	5,175.61
1900	1,605,659	4,788.75
1901	1,501,827	4,467.21
1902	1,636,797	4,868.57

(19) That between said years 1884 and 1902, both inclusive, said C. N. O. & T. P. Ry. Co. improperly devoted out of its earnings certain sums of money, the exact amount of which your orators do not know and can not ascertain, to permanent improvements and additional rolling stock which were in no manner any part of the fixed charges or operating expenses, and which properly belonged to capital account and should have been credited to the net earnings of the said C. N. O. & T. P. Ry. Co., and which, if so properly credited would have shown a larger amount to the credit of net earnings per mile between said years 1884 and 1902, both inclusive, than as stated in the preceding paragraph.

(20) That between the years 1903 and 1908, both inclusive, said C. N. O. & T. P. Ry. Co. expended for permanent improvement and new rolling stock the following sums of money for the following items, to-wit:

9	Bridges .....	\$2,274,424.22
	Terminal Facilities, including yards and freight houses .....	2,132,000.00
	Shops .....	546,000.00
	Water Stations .....	35,000.00
	Double track and change in grade .....	2,212,829.84
	Sidings .....	676,000.00
	Station Buildings .....	82,200.00
	Signals .....	201,761.73
	Engines .....	1,175,540.00
	Passenger cars .....	140,763.00
	Freight cars .....	3,936,119.00
	Total .....	\$13,412,637.79

That prior to the year 1903 said C. N. O. & T. P. Ry. Co.'s capital stock was \$3,000,000.00 common stock, and in the year 1903 said company increased its capital stock by the issue and sale of \$2,000,000.00 preferred stock of said company and realized \$2,000,000.00 from said sale and applied said \$2,000,000.00 on account of purchase of said engines and said freight cars above referred to.

That said C. N. O. & T. P. Ry. Co. on April 1, 1906, borrowed \$1,500,000.00 and issued notes therefor and applied the proceeds of said notes to pay for construction of double track, changing of grades, and rebuilding and strengthening bridges, as above indicated.

That on December 2, 1907, said C. N. O. & T. P. Ry. Co. borrowed \$500,000 and issued notes therefor and applied the proceeds of said notes to pay for rebuilding bridges and construction of double track, as above indicated.

That between said years 1903 and 1908, both inclusive, said C. N. O. & T. P. Ry. Co. took up and paid \$683,000 of said notes so issued and said \$683,000 was taken out of its earnings.

That said \$2,000,000 derived from the sale of said preferred stock and said \$2,000,000 derived from the issue of said notes, less said \$683,000, to-wit, \$3,317,000, was part of the expenditure of said

\$13,412,637.79 and that the balance, to-wit, the sum of \$10,095,637.79, was taken and paid out of the earnings of said C. N. O. & T. P. Ry. Co.

That said C. N. O. & T. P. Ry. Co. between said years of 1903 and 1908, both inclusive, expended out of its earnings the sum of \$1,023,789.79 for securities which are still owned by said C. N. O. & T. P. Ry. Co.

10 That the amount expended by said C. N. O. & T. P. Ry. Co. out of its earnings between the years 1903 and 1908, both inclusive, for said permanent improvements, said new rolling stock and said securities amounted to \$11,119,427.58.

That your orators have no means of ascertaining and therefore can not allege how much was so expended for said permanent improvements, said new rolling stock and said securities during each of said years, but alleges and show to the Court that the average yearly amount so expended by said C. N. O. & T. P. Ry. Co. out of its earnings for said permanent improvements, said new rolling stock and said securities was \$1,853,237.93, and that the yearly amounts during the first three years were below said average and for the last three years above said average.

(21) That between said years 1903 and 1908, both inclusive the net earnings of said C. N. O. & T. P. Ry. Co. were as follows:

Year	Part of net earnings, before deducting rentals, interest and taxes, not expended for said permanent improvements, said new rolling stock and said securities.	Balance of net earnings expended for said permanent improvements, said new rolling stock and said securities yearly average.
1903	\$1,722,009.00	\$1,853,237.93
1904	1,813,422.00	1,853,237.93
1905	1,933,722.00	1,853,237.93
1906	2,278,226.00	1,853,237.93
1907	1,948,312.00	1,853,237.93
1908	1,956,980.00	1,853,237.93

That the net earnings of said C. N. O. & T. P. Ry. Co., before deducting rentals, interest and taxes, of said road, made up of the said two sums, as aforesaid, and the net earnings per mile between said years 1903 and 1908, both inclusive, are respectively as follows:

Year	Net earning before deducting rentals interest and taxes.	Net earnings per mile before deducting rentals, interest and taxes.
1903	\$3,575,246.93	\$10,637.47
1904	3,666,659.93	10,912.66
1905	3,787,009.93	11,272.22
1906	4,131,463.93	12,296.01
1907	3,801,579.93	11,309.39
1908	3,810,217.93	11,349.30

11 (22) That between said years 1903 and 1908, both inclusive, the net earnings of said C. N. O. & T. P. Ry. Co. after deducting rentals, interest and taxes were as follows:

Year	Part of net earnings, after deducting rentals, interest and taxes, not expended for said permanent improvements, said new rolling stock and said securities.	Balance of net earnings expended for said permanent improvements, said new rolling stock and said securities—yearly average.
1903 .....	\$463,185.23	\$1,853,237.93
1904 .....	373,323.65	1,853,237.93
1905 .....	382,449.60	1,853,237.93
1906 .....	387,764.34	1,853,237.93
1907 .....	334,644.89	1,853,237.93
1908 .....	267,509.91	1,853,237.93

(23) That the net profits of said C. N. O. & T. P. Ry. Co., after deducting rentals, interest and taxes of said road and all operating expenses and every other expense and charge between said years 1903 and 1908, both inclusive, are the sum of the respective items given in paragraph (22) hereof and are as follows:

Year.	Net profits.
1903.....	\$2,316,423.16
1904.....	2,327,571.58
1905.....	2,235,687.53
1906.....	2,241,002.27
1907.....	2,187,882.82
1908.....	2,120,747.84

Total for 6 years..... \$13,329,315.20

Your orators show that as set forth in paragraph 20 of this Bill of Complaint, that your orators could not ascertain the exact amount expended each year for permanent improvements, new rolling stock and securities and thereupon gave a yearly average thereof, and that the figures above given as the net profits is a result of said average and that as a matter of fact, there was a smaller amount so expended during the three years from 1903 to 1905 both inclusive than during the three years of 1906 to 1908, both inclusive, and that correspondingly the net profits for each of said years 1903 to 1905 both inclusive, are less than there given and that the net profits for the years 1906 to 1908, both inclusive are larger than there given, but that the aggregate of said years 1903 to 1908 both inclusive is a correct statement of said net profits and that your orators are without means of giving more accurately said net profits per year than as set forth in this paragraph.

(24) That the net profits shown in paragraph 23 hereof when divided by the mileage of said C. N. O. & T. P. Ry. Co., namely 336 miles gives a net profit per mile for the years 1903 to 1908, both inclusive, as follows:

Year.	Net profit per mile.
1903.....	\$6,894.11
1904.....	6,629.64
1905.....	6,653.83
1906.....	6,669.64
1907.....	6,511.55
1908.....	6,311.74

(25) Your orators show that the sum of the net profits of said C. N. O. & T. P. Ry. Co. as set forth in paragraph 23 hereof for the years 1903-1908 both inclusive was \$43,329,315.20, equivalent to a yearly average of net profits thereon for said six years of \$2,221,552.53 after deducting rentals, interest, taxes and all operating expenses and every other charge and expense.

(26) That the value of the said property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and for the public convenience between said years 1903 and 1908 both inclusive was \$5,000,000.00 represented by five million dollars of outstanding and issued capital stock of the par value of \$5,000,000.00, and that the percentage of said net profits earned thereon by said C. N. O. & T. P. Ry. Co. *thereon* between the years 1903 and 1908 amounted to 266.58 per cent. and that the yearly average of said net profits so earned for each of said six years amounted to 44.43 per cent. per annum.

(27) Your orators further show that on November 24, 1894, as set forth in paragraph (9) thereof, the Interstate Commerce Commission prescribed as just and reasonable maximum rates for said classes in cents per hundred pounds as follows:

Class .....	1	2	3	4	5	6
Rate .....	60	54	40	30	24	22

That if said rates had been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903-1908 both inclusive, the annual average net profits of said C. N. O. & T. P. Ry. Co. would, on the same tonnage have been reduced annually by a sum not to exceed \$188,651.30; that the average annual net profits of said C. N. O. &

T. P. Ry. Co. for the years 1903-1908 both inclusive, would 13 then have been the difference between \$2,221,552.53 shown in paragraph (25) hereof and said sum of \$188,651.30, namely \$2,032,871.23; that said annual net profits of \$2,032,871.23 is equivalent to an annual return upon the value of the property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and the public convenience as set forth in paragraph (26) hereof and represented by \$5,000,000.00 capital stock of said C. N. O. & T. P. Ry. Co. of 40.66 per cent. per annum or a total of 242.96 per cent. for the six years 1903 to 1908 both inclusive.

(27a) Your orators further show that if the schedule of rates for said classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

prescribed by the said Commission in its order in case No. 1542, referred to in paragraph (28) hereof had been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903-1908, both inclusive, the annual average net profits of said C. N. O. & T. P. Ry. Co. would on the same tonnage have been reduced annually by a sum not to exceed \$12,000; that the average annual net profits of said C. N. O. & T. P. Ry. Co. for the years 1903-1908, both inclusive, would then have been the difference between \$2,221,552.53 shown in paragraph (25) hereof, and said sum of \$12,000, namely, \$2,209,552.53; that said annual net profit of \$2,209,552.53 is equivalent to an annual return upon the value of the property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and for the public convenience as set forth in paragraph (25) hereof and represented by \$5,000,000 capital stock of said C. N. O. & T. P. Ry. Co. of 44.18 per cent. per annum, or a total of 265.08 per cent. for the six years, 1903-1908, both inclusive.

## II.

(28) That on the 30th day of April, 1908, said Receivers' & Shippers' Association, a voluntary association in the City of Cincinnati, County of Hamilton and State of Ohio, with a membership of over 250 individuals, firms, partnerships and corporations, including your orators and including also in its membership the following business organizations of Cincinnati:

The Chamber of Commerce,

The Business Men's Club,

The Manufacturers' Club,

The Lumbermen's Club,

14 The Pork Packers & Slaughterers' Association,

The Carriage Makers' Club,

The Live Stock Commission Merchants' Association,

The Cincinnati Furniture Exchange,

The Queen City Furniture Club,

The Cincinnati Paint Club,

The Pine Lumber Dealers' Association.

The Cincinnati Branch National League of Commission Merchants, filed its complaint with said Commission against said C. N. O. & T. P. Ry. Company, complaining that the rates for the service set forth in paragraph (7) herein were unjust and unreasonable and that said Commission should prescribe just and reasonable rates and said complaint was numbered 1542.

(29) That said complaint number 1542 as aforesaid was duly investigated by said Commission upon the pleadings and the evidence and the case of complainant was as set forth in paragraphs (5) to (27) both inclusive of this Bill of Complaint and that on said investigation the facts set forth in paragraphs (5) to (27) both



inclusive of this Bill of Complaint were conceded and undisputed and said case was duly made out and established.

(30) That the receipt of evidence on said investigation by said Commission was closed and concluded on the — day of January, 1909, and said complaint was duly argued and submitted to said Commission on the 10th day of May, 1909; that on the 24th day of May, 1910, said Commission made, handed down, filed and entered a report in writing in respect thereto which said report stated the findings of fact and conclusions of said Commission together with its decision, order and requirements in the premises, and which report contained the findings of fact and conclusions thereon of said Commission, and that said report was referred to and made part of the order entered therein. That said report although only handed down on the 24th day of May, 1910, was dated as of Feb. 17, 1910. That said complete report (including the order) is hereto attached and made part hereof and identified as Exhibit "A."

(31) That said Commission in its said report, findings of fact and conclusions thereon, and its order and requirements therein, which said report, findings of fact and conclusions thereon were by said Commission referred to and made part of the order therein, said Commission duly found as follows:

(a) That the questions (1) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee over said railroad were inherently unreasonable and unreasonable considered in and of themselves; (2) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee over said railroad were extortionate; and (3) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee, over said railroad were too high, were presented to said Commission; that in so finding said Commission used the following language:

"Second, are the rates upon these numbered classes from Cincinnati and Chicago to Chattanooga unreasonable considered in and of themselves (18 I. C. C. R. p. 452).

And again:

"The chief contention of the complainants is that these charges are extortionate in view of the circumstances under which the service is rendered." (18 I. C. C. R. ps. 457, 458.)

And again:

"This brings us to the inherent reasonableness of these rates themselves." (18 I. C. C. R. p. 459.)

And again:

"The complainants insist that these rates from Cincinnati to Chattanooga considered as transportation charges for the service rendered are too high." (18 I. C. C. R. p. 459.)

(b) That said C. N. O. & T. P. Ry. is a single trunk line without branches running from Cincinnati to Chattanooga; that said C. N. O. & T. P. Ry. Co. is known as the Cincinnati Southern Railroad; that said Commission in so finding used the following language, to-wit:

"The Cincinnati Southern Railroad is a single trunk line without branches running from Cincinnati to Chattanooga." (18 L. C. C. R. p. 465.)

(c) That the operation of said C. N. O. & T. P. Ry. Co. is entirely distinct from that of any other railroad; that said Commission in so finding used the following language:

"Its (C. N. O. & T. P. Ry. Co.) operation is in fact entirely distinct from that of the Southern Railway." (18 L. C. C. R. p. 457.)

Said Commission also used the following language:

"We must under this construction of the law dispose of this case as though these two companies (C. N. O. & T. P. Ry. Co. and the Southern Railway Co.) were distinct in fact as well as in name and in operation." (18 L. C. C. R. p. 457.)

16 (d) That said Cincinnati Southern Railroad leading from the said City of Cincinnati, Ohio, to said City of Chattanooga, Tenn., is and was operated by the C. N. O. & T. P. Ry. Co. and is known as the Cincinnati Southern; that it was constructed by the City of Cincinnati, being opened for business about the year 1880; that the original cost of said railroad was \$18,000,000.00 and that said City of Cincinnati subsequently expended in terminal facilities about \$2,500,000.00 making a total cost of \$20,500,000.00; that said Commission in so finding used the following language, to-wit:

"The railroad leading from Cincinnati to Chattanooga and now operated by the Cincinnati, New Orleans and Texas Pacific Company is the Cincinnati Southern. It was constructed by the City of Cincinnati, being opened for business about the year 1880. The original cost of the railroad was \$18,000,000.00 and the City subsequently expended in terminal facilities about \$2,500,000.00 making a total cost of \$20,500,000.00." (18 L. C. C. R. p. 459.)

(e) That the City of Cincinnati had legislative authority to build, but not to operate said railroad, and that said C. N. O. & T. P. Ry. Co. was organized for the purpose of leasing and operating said Cincinnati Southern Railroad; that the first lease thereof was for a term of twenty-five years and expired in 1906; that said lease was extended by popular vote in the year 1901 for a term of sixty years, and that thereby said lease will expire in the year 1966; that the rental under said original lease was \$1,250,000.00 per year and yielded said City of Cincinnati approximately six per cent. upon the cost of said property; that the rental under said extended lease was \$1,050,000.00 per year during the first twenty years thereof and provided for a somewhat larger rental for the balance of the term, yielding said City of Cincinnati a return in excess of 5 per cent. upon the cost of the property; that said City of Cincinnati borrowed said money for 3½ per cent. and that said City of Cincinnati made a clear profit of 1½ per cent. upon the transaction; that said Commission in so finding used the following language:

"The City of Cincinnati had legislative authority to build but not to operate this railroad and the Cincinnati, New Orleans & Texas Pacific Railway Company was organized for the purpose of leasing and operating the Cincinnati Southern Railroad. The first lease

was for twenty-five years and expired in 1906, but this lease was extended by popular vote in the year 1901 for a term of sixty years so that the present lease expires in 1966. The rental under the original lease was \$1,250,000.00 per year, or about 6 per cent upon the cost of the property. The rental under the present lease during the first twenty years of the term is \$1,050,000.00 per year, somewhat more for the balance, thus yielding a return in excess of 5 per cent upon the cost of the property. The City borrows this money for 3½ per cent, thereby making a clear profit of 1½ per cent upon the investment." (18 I. C. C. R. p. 460.)

(f) That since 1899 said C. N. O. & T. P. Ry. Co. has paid all rentals and shows very handsome returns from operation; that said railroad is unique among railroads in the South; that its gross earnings per mile for the year 1907 were over \$26,000, which was more than the average gross earnings of the railroads in any group in the United States, and more than the gross earnings of most railroad systems of the United States; that during the year 1907 said C. N. O. & T. P. Ry. carried more tons of freight one mile than the average in any group of the United States; that its tonnage and its gross earnings per mile were approximately four times that of the Southern Railway; that said Commission in so finding in reference to said C. N. O. & T. P. Ry. since 1899, used the following language:—

"Since that time it has paid the stipulated rental and has shown very handsome returns from operations as well. This property today is unique among railroads in the South. Its gross earnings per mile for the year 1907 were over \$26,000.00, more than the average gross earnings of the railroads in any group in the United States and more than the gross earnings of most railroad systems in the United States. It carried during the year 1907 more tons of freight one mile than the average in any group in the United States. Its tonnage and its gross earnings per mile were nearly four times those of the Southern Railway by which it is controlled." (18 I. C. C. R. 461).

(g) That said C. N. O. & T. P. Ry. Co. owns its equipment but has no interest in the Cincinnati Southern Railroad beyond the right to use it for the stipulated term; that said Commission in so finding used the following language:

"The Company (C. N. O. & T. P. Ry. Co.) owns the equipment but has no interest in the railroad (Cincinnati Southern Railroad) beyond the right to use it for the stipulated term." (18 I. C. C. R. p. 462).

(h) That said C. N. O. & T. P. Ry. Co. has no right to pledge the bridges or tracks of the said Cincinnati Southern Railroad to raise money to reconstruct bridges or lay additional tracks; that said C. N. O. & T. P. Ry. Co. was merely entitled to a fair return upon the value of the property devoted by it to the public use and that said C. N. O. & T. P. Ry. Co. was not entitled to have property acquired by it paid for by the public; that the stockholders of said C. N. O. & T. P. Ry. Co. had entered upon their investment without means to provide necessary funds with which to carry it on; that for that reason said stockholders of

said C. N. O. & T. P. Ry. Co. had no right to impose unreasonable rates; that said C. N. O. & T. P. Ry. Co. and its stockholders had no right to make a rate unreasonable for the purpose of supplying money to make permanent improvements by way of bridges, additional tracks, and otherwise; that said Commission in so finding used the following language:—

"If therefore, it is found necessary to reconstruct a bridge or lay an additional track, the company (C. N. O. & T. P. Ry. Co.) cannot pledge that bridge or track for the necessary money with which to make the improvement.

"The testimony shows that in order to handle the business offering, it has been necessary already to expend large sums in the improvement of the roadway and structure, and that further large sums must be expended in the future. This money, say the defendants, can only be obtained from income from operation, and hence a sufficient rate should be allowed to permit the making of these necessary additions.

"This position is not well taken. A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, but it is not entitled to have that property paid for by the public. This commission has so decided in *Central Yellow Pine Ass'n v. I. C. R. R. Co.* 10 I. C. C. Rep. 505, and the Supreme Court has affirmed the correctness of this holding in *Illinois Central R. R. Co. v. Interstate Commerce Commission* 206 U. S. 441. If these stockholders have entered upon this enterprise without the means to provide necessary funds with which to carry it on, that can be no reason for the imposition of rates otherwise unreasonable." (18 I. C. C. R. p. 462).

(i) That the grades of the said C. N. O. & T. P. Ry. from said City of Cincinnati, Ohio, to said Chattanooga, Tennessee, were heavy, exceeding for 38 per cent. of its distance a one per cent. grade, and that the cost of operation and maintenance was high; but that nevertheless the net earnings of said C. N. O. & T. P. Ry. Co. computed upon a basis prescribed by the Interstate Commerce Commission had for several years then last past reached \$7,000 per mile, and that if it were the duty of said Interstate Commerce Commission to take said railroad by itself and to determine the reasonableness of the rates complained of by reference to cost of construction and cost of maintenance and profit upon the investment that the complainant in said case No. 1542 had established their case, and that the rates ought fairly to be reduced by as great an amount as was formerly found reasonable by said Commission in cents per hundred pounds were as follows:

Classes	1	2	3	4	5	6
Rates	60	54	40	30	24	22

That in so finding said Commission used the following language:—

"The grades of this railroad are heavy, exceed for 38 per cent. of its distance a one per cent. grade, and the cost of operation and maintenance is high, but nevertheless its net earnings computed upon the basis prescribed by the Interstate Commerce Commission,

have for several years last past reached \$7,000 per mile. If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission." (18 I. C. C. R. p. 461).

### III.

(32) Your orators show that it was the duty of the Commission in determining what rates were just and reasonable on said classes of goods, ware and merchandise from Cincinnati, Ohio, to Chattanooga, Tennessee, to consider the cost of operation and maintenance and compute its net earnings upon the basis prescribed by the Interstate Commerce Commission and to treat said Railroad by itself, and to determine the reasonableness of said rates by reference to cost of construction, cost of maintenance and profit upon the investment and that upon said report of said Commission containing its findings of fact and conclusions thereon and made part of its order, said Commission should have entered an order as to said class rates as so found by said Commission to be just and reasonable not to exceed in cents per hundred pounds as follows:

Classes	1	2	3	4	5	6
Rates	60	54	40	30	24	22

20 (33) Your orators further show that notwithstanding said report containing said findings of fact and conclusions thereon which were embodied in and made part of its order, that said Commission merely required the C. N. O. & T. P. Ry. Co. to cease and desist on or before the 15th day of July, 1910, from exacting rates and notifying said The Cincinnati, New Orleans & Texas Pacific Railway Company to establish on or before the 15th day of July, 1910, and maintain in force thereafter, during a period of not less than two years rates for the transportation of articles in said numbered classes, not to exceed in cents per hundred pounds as follows:—

Classes	1	2	3	4	5	6
Rates	70	60	53	44	38	29

Herein for brevity called "70 cent schedule."

### IV.

(34) Your orators further show that said Commission in said case No. 1542 interpreted and applied the Act of Congress of the United States entitled "An Act to Regulate Commerce" approved February 4, 1887, and the Acts amendatory thereof and supplementary thereto without regard to their terms and requirements and without regard to other statutes of the United States and without

regard to the limitations imposed by the Constitution of the United States and the Amendments thereto, particularly the limitations imposed by Article V of the Amendments to the Constitution of the United States which provides:—

(a) "No person \* \* \* shall be deprived of \* \* \* property without due process of law."

(b) "Nor shall private property be taken for public use without just compensation."

(35) Your orators further show that the money which the parties aggrieved are required to pay to said C. N. O. & T. P. Ry. Co., under said schedules of rates, for the said transportation over its said road of any and all said shipments of said goods, wares and merchandise under said respective classes, made by parties aggrieved, from said city of Cincinnati, Ohio, to said city of Chattanooga, Tennessee, is property and private property, within the meaning of the fifth amendment to the Constitution of the United States.

(36) Your orators further show that as set forth in paragraph (31) sub-paragraph (i), said Commission found that taking said railroad by itself and determining the reasonableness of said schedule of rates by reference to cost of construction, cost of maintenance, and profit upon the investment, complainants in

21 said case No. 1542 had established their case, and that said schedule of rates ought fairly be reduced by as great an amount as was formerly found reasonable by said Commission; the rates so formerly found reasonable were as per schedule in cents per hundred pounds as follows:

Classes	1	2	3	4	5	6
Rates	60	54	40	36	24	22

and that said finding was a determination that said 60-cent schedule afforded a reasonable return to said C. N. O. & T. P. Ry. Co. on its property employed in and devoted to the public use, and for the public convenience, and that said 60 cent schedule was a reasonable and just schedule of rates for the said transportation service performed by the said C. N. O. & T. P. Ry. Co. from said city of Cincinnati, Ohio, to the said city of Chattanooga, Tennessee.

That the parties aggrieved, on any and all said shipments over said road of said goods, wares and merchandise made by said parties aggrieved, under said respective classes, from the city of Cincinnati, Ohio, to the city of Chattanooga, Tennessee, are deprived of their property without due process of law in this, to-wit: that notwithstanding said finding, said Commission, by its order, required said C. N. O. & T. P. Ry. Co. to establish on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for transportation over said road of said articles in the said numbered classes of the said Southern Classification, from Cincinnati, Ohio, to Chattanooga, Tennessee, not to exceed the following in cents per hundred pounds.

Classes	1	2	3	4	5	6
Rates	70	60	53	44	38	29

and thereby licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally, and unlawfully to take said private property of the parties aggrieved and to transfer the ownership thereof to the ownership and into the treasury of the said C. N. O. & T. P. Ry. Co., to the amount and extent of the differences between the said 60-cent schedule and the said 70 cent schedule of rates, in cents per hundred pounds, for the respective classes, as follows:

Classes	.....	1	2	3	4	5	6
Differences	....	10	6	13	14	14	7

That said differences between the said two schedules of rates, in cents per hundred pounds, namely:

Classes	.....	1	2	3	4	5	6
Differences	....	10	6	13	14	14	7

22 represent the amounts and value of said private property of the parties aggrieved which the said Commission by its said order licensed, empowered and authorized said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully take from the said parties aggrieved, and transfer the ownership of said private property to the ownership and into the treasury of the said C. N. O. & T. P. Ry. Co.

That said C. N. O. & T. P. Ry. Co., by charging and collecting said 70 cent schedule of rates on any and all said shipments over said road of said goods, wares and merchandise under said respective classes, made by the parties aggrieved from Cincinnati, Ohio, to Chattanooga, Tennessee, and the authority given by said order of said Commission, to so take the private property of the parties aggrieved in the manner aforesaid, deprives said parties aggrieved of said private property unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully, and therefore without due process of law, to the amount and extent of said differences, in cents per hundred pounds for said respective classes.

Your orators further show that the parties aggrieved, on any and all said shipments over said road of goods, wares and merchandise, under said respective classes made by the parties aggrieved from said city of Cincinnati, O., to said city of Chattanooga, Tenn., are deprived of their property without due process of law in this, to-wit: that said commission, by its order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully levy a tax upon the parties aggrieved to the amount and extent of said differences hereinbefore set forth; and said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully levy tribute on the parties aggrieved to the amount and extent of said differences hereinbefore set forth; and said Commission by its order licensed, authorized and empowered



said C. N. O. & T. P. Ry. Co. to unjustly, arbitrarily, unconstitutionally and unlawfully confiscate the said private property of the parties aggrieved to the amount and extent of said differences hereinbefore set forth; that said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, arbitrarily, unconstitutionally and unlawfully to make an enforced contribution to said C. N. O. & T. P. Ry. Co. to the amount and extent of said differences

hereinbefore set forth; that said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to levy and collect said tax, levy and collect said tribute, and confiscate and collect said amounts and enforce and collect said contributions for the use and benefit of said C. N. O. & T. P. Ry. Co. and its stockholders.

(37) Your orators further show that the parties aggrieved, on any and all said shipments over said road of said goods, wares and merchandise made by said parties aggrieved, under the said respective classes, from said city of Cincinnati, Ohio, to the said city of Chattanooga, Tennessee, are required to pay to said C. N. O. & T. P. Ry. Co. by said order of said Commission the following amounts of their private property for said transportation service in the said respective classes in cents per hundred pounds as follows:

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

and that for the said private property which the parties aggrieved pay to said C. N. O. & T. P. Ry. Co. under said 70 cent schedule of rates, said C. N. O. & T. P. Ry. Co. renders to said parties aggrieved compensation in the way of transportation services in exchange for said private property of said parties aggrieved, only to the extent of said 60 cent schedule of rates, in cents per hundred pounds, as follows:

Classes .....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

That said C. N. O. & T. P. Ry. Co. renders said parties aggrieved no compensation for their private property which they are required to pay said C. N. O. & T. P. Ry. Co. for said service on said respective classes, in excess of said 60 cent schedule of rates by the said order of said Commission, and said parties aggrieved are thus deprived of their private property without just compensation to the amount and extent of the difference between said 70 cent schedule of rates and said 60 cent schedule of rates, in cents per hundred pounds, for said respective classes, as follows:

Classes .....	1	2	3	4	5	6
Differences ....	10	6	13	14	14	7

## V.

(38) Your orators further show that the Louisville & Nashville Railroad Company (herein for brevity called L. & N. R. R. Co.), a corporation under the laws of the State of Kentucky, and the Nashville, Chattanooga and Saint Louis Railway (herein for brevity called N. C. & St. L. Ry.), a corporation under the laws of

24 the State of Tennessee, asked leave to intervene in said case

No. 1542 and the Commission granted the request of said roads in this respect, and the said roads were then and there heard without formal pleading.

(39) Your orators further show that at the time of said hearing of said case No. 1542, and since that time, said L. & N. R. R. Co. operated 4365.2 connected miles of railroad in the States of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina between the following points with the following mileages, to-wit:

	MILES.
Louisville, Ky., to Nashville, Tenn.....	185.92
Gallatin, Tenn., to Scottsville, Ky.....	35.92
Hartsville Junc. to Hartsville, Tenn.....	11.36
Louisville, Ky., to Cincinnati, Ohio.....	109.82
East Louisville to South Louisville, Ky.....	4.15
"A" Street Connections to Louisville, Ky.....	.76
Louisville to Pipe Line Ave., Ky.....	3.46
La Grange to Lexington, Ky.....	67.00
Shelbyville to Christiansburg, Ky.....	8.51
Anchorage to Shelbyville, Ky.....	18.58
Shelbyville to Bloomfield, Ky.....	26.72
Covington to Corbin, Ky.....	184.02
Ft. Estill Junc. to Rowland, Ky.....	30.47
Bush Creek to Johnetta, Ky.....	4.85
Bardstown Junc. to Springfield, Ky.....	37.44
Lebanon Junc., Ky., to Sinks, Ky.....	107.28
Wilton Junc. to Lorena, Ky.....	3.90
Jellico, Tenn., to Halsey, Ky.....	8.11
Maxie to Kensee, Ky.....	1.78
Cumb. & Ohio Jc. to Greensburg, Ky.....	30.90
Corbin, Ky., to Norton, Va.....	117.44
Orby to Harrison, Ky.....	17.13
Middlesboro, Ky., to Manring, Tenn.....	8.14
Stony Fork Junc. to Logmont, Ky.....	6.08
Logmont to Elwood, Ky.....	2.87
Edgefield Junc., Tenn., to Howell, Ind.....	145.36
Madisonville to Providence Mine, Ky.....	16.10
Memphis Junc., Ky., to Memphis, Tenn.....	259.13
Leewood to Aulon, Tenn.....	2.46
Clarksville, Tenn., to Gracey, Ky.....	32.00
Hematite to Pond, Tenn.....	30.71
Van Leer to Cumberland Furnace, Tenn.....	6.19
Columbia, Tenn., to Florence, Ala.....	81.13

	Sheffield to Tuscumbia, Ala.....	2.63
25	Iron City to Pinkney, Tenn.....	11.78
	Napier June. to Napier, Tenn.....	10.92
	Tenn. & Ala. June. to Long Branch, Tenn.....	7.32
	Magella to Brickyard, Ala.....	8.02
	Winetka to Steinman, Ala.....	3.16
	Graces to Bessemer, Ala.....	11.77
	Muscoda June. to Muscoda, Ala.....	1.50
	Blue Creek June. to Blockton June., Ala.....	27.07
	Yolande to Brookwood, Ala.....	8.44
	Chamblee to Goethite, Ala.....	3.99
	Boyles to Bessemer, Ala.....	15.74
	Boyles to Moragne, Ala.....	60.14
	Village Springs to Compton, Ala.....	3.32
	Palmer to Bradford, Ala.....	4.40
	Boyles to Truissville, Ala.....	17.13
	Red Gap Junction to Graces, Ala.....	10.26
	Tacoa to Gurnee Junction, Ala.....	9.99
	Readers to Ferro No. 2, Ala.....	2.30
	Vinita to Graves Mine, Ala.....	2.62
	Hewitt Junction to Hewitt, Ala.....	0.67
	Mattawana to Deming, Ala.....	1.73
	Saxton, Ky., to Jellico, Tenn.....	3.19
	Valley Creek to Virginia, Ala.....	2.05
	No. Ala. June. to Searles, Ala.....	3.32
	Black Creek to Praco, Ala.....	29.12
	Ridgeland to Arcadia, Ala.....	1.32
	Mineral Springs to Dunn, Ala.....	1.08
	Mineral Springs to Rihna, Ala.....	2.30
	Crocker June. to Durant, Ala.....	2.59
	Edora to Erskine, Ala.....	0.73
	Chetopa to Banner, Ala.....	4.02
	Vulcan to Sayre Mines, Ala.....	1.69
	Altoona to Schuler, Ala.....	1.14
	Doleito June. to Doleito, Ala.....	0.98
	Dixiana June. to Dixiana, Ala.....	0.52
	Connellsville June. to Connellsville, Ala.....	1.77
	Abernaut to Rock Castle, Ala.....	1.59
	Coffee June. to Martaban, Ala.....	1.03
	Spring Gap No. 1 to Skyhy, Ala.....	1.60
	Attalla to Calera, Ala.....	119.07
	Shelby to Columbiana, Ala.....	5.84
	Gilmore Switch to Gantt's Quarry, Ala.....	1.72
	O'Connor June. to Buck, Ala.....	2.90
	Wewoka June. to Wewoka, Ala.....	1.37
	Rockspring to Leba, Ala.....	1.65
26	Prattville June. to Prattville, Ala.....	10.35
	Montgomery to Mobile, Ala.....	177.67
	Georgiana, Ala., to Graceville, Fla.....	100.38
	Duvall, Ala., to Paxton, Fla.....	23.48
	McPhail, Ala., to Lakewood, Fla.....	2.80

Mobile, Ala., to New Orleans, La.....	140.54
Selma to Escambia Junction, Ala.....	111.09
Camden Junction to Camden, Ala.....	16.55
Selma to Myrtlewood, Ala.....	60.25
Flomaton, Ala., to Pensacola, Fla.....	44.64
Pensacola to River Junction, Fla.....	160.47
Corbin, Ky., to Etowah, Tenn.....	162.66
Holton to Hyde, Tenn.....	2.21
Ilford to Westbourne, Tenn.....	2.93
Dossett to Khotan, Tenn.....	12.24
Khotan to Windrock, Tenn.....	0.72
Etowah, Tenn., to Junta, Ga.....	89.38
Etowah, Tenn., to Marietta, Ga.....	142.57
Armona to Marysville, Tenn.....	3.86
Mentor to Greenback, Tenn.....	17.76
Greenback to Jena, Tenn.....	1.14
Murphy June., Ga., to Murphy, N. C.....	23.41
Crestview to Floral, Fla.....	26.40
Gurley June. to Lehigh No. 2, Ala.....	7.90
Owensboro to Adairville, Ky.....	83.46
Penrod to Mud River, Ky.....	4.64
Stouts M't'n June. to Stouts Mountain, Ala.....	5.91
Bay Minette to Foley, Ala.....	36.52
Providence to Morganfield, Ky.....	25.33
Ponchartrain June. to Milneburg, La.....	4.96
Maysville to Paris, Ky.....	49.48
Paris to Lexington, Ky.....	17.86
Yingling to Chadman, Ky.....	2.14
Swan Creek June. to Fancette, Tenn.....	17.10
Evansville, Ind., to East St. Louis, Ill.....	160.96
McLeansboro June. to Shawneetown, Ill.....	40.70
O'Fallon June. to O'Fallon, Ill.....	6.04
Nashville, Tenn., to M.-C. June., Ala.....	118.98
Decatur to Montgomery, Ala.....	182.67
Elmore to Wetumpka, Ala.....	6.30
Fedora to Indio, Ala.....	2.95
Hodgeland June. to El Vista, Ala.....	0.98
Helena to Acton, Ala.....	7.60
Glasgow Junction to Glasgow, Ky.....	10.50
Elkton to Guthrie, Ky.....	10.92
27 Track in Nashville, Tenn.....	1.15
Hyde, Tenn., to Fonde, Ky.....	11.21
M. & C. Junction to Decatur, Ala.....	1.69
Furnace June. to Sheffield, Ala.....	2.86
Gurnee Jr. to Blockton, Ala.....	14.30
Aden to Masena, Ala.....	3.83
Seymour, Ala., to end of track.....	3.91
Ardella to Hansell, Ala.....	2.90
Wellington, Ala., to Cartersville, Ga.....	77.40
Blockton June. to Blockton, Ala.....	7.73
Track at Norton, Va.....	0.73

Apalachia to Big Stone Gap Furnace, Va.....	3.77
Aulon to South Memphis, Tenn.....	5.46
Morgane to Attalla, Ala.....	1.89
Track at Gadsden, Ala.....	0.43
Junta to Atlanta, Ga.....	48.09
Track at East St. Louis, Ill.....	0.11
Track at Cincinnati, Ohio.....	0.61
Relay Depot, East St. Louis, Ill., to Union Station, St. Louis, Mo.....	3.84
Track at River Junction, Fla.....	0.94
Tracks at Selma, Ala.....	0.87
Cent. Un. Dep., Cin'ti, O., to Covington, Ky.....	2.18
Track at Lexington, Ky.....	0.20
Track at Providence, Ky.....	0.30
Pipe Line Ave. to Prospect, Ky.....	7.70
Track at Lexington, Ky.....	0.22
Track at Owensboro, Ky.....	0.26
Total .....	4,365.20

Your orators further show that the above lines of road operated by said L. & N. R. R. Co. are shown and set forth in heavy red lines on the drawing hereto attached marked Exhibit "B" and made a part hereof.

(40) Your orators further show that at the time of said hearing of said case No. 1542, and since said time, said N. C. & St. L. Ry. operated 1230.05 connected miles of railroad in the States of Kentucky, Tennessee, Alabama and Georgia between the following points with the following mileages, to-wit:

	MILES.
Chattanooga, Tenn., to Hickman, Ky.....	320.21
Wartrace, Tenn., to Shelbyville, Tenn.....	8.01
Bridgeport, Ala., to Pikeville, Tenn.....	68.10
Decherd to Columbia, Tenn.....	86.35
28 Elora, Tenn., via Huntsville, Ala., to Tenn. River Guntersville to Gadsden, Ala.....	80.08
Tallahoma to Clifty, Tenn.....	84.60
Cowan, Tenn., to Coalmont, Tenn.....	31.17
Nashville, Tenn., to Lebanon, Tenn.....	29.21
Dickson, Tenn., to Allens Creek, Tenn.....	69.91
Kingston to Rome, Ga.....	18.15
Nashville, Tenn., to West Nashville, Tenn.....	6.26
Fayetteville, Tenn., to Lax, Ala.....	36.98
Atlanta, Ga., to Chattanooga, Tenn.....	136.82
Paducah, Ky., to Memphis, Tenn.....	254.20
Total .....	1,230.05

Your orators further show that the above lines of road operated by said N. C. & St. L. Ry. are shown and set forth in the heavy

yellow lines with numerous short lines crossing same on the drawing hereto attached marked Exhibit "B" and made a part hereof.

(41) Your orators further show that the single trunk line railroad of the C. N. O. & T. P. Ry. Co., which is 336 miles long and which has no branches and extends from the said City of Cincinnati, Ohio, to said City of Chattanooga, Tenn., is shown by a single heavy blue line with numerous short lines crossing same on said drawing hereto attached and marked Exhibit "B" and made a part hereof.

(42) Your orators further show that the distance from said City of Cincinnati, Ohio, to the said City of Chattanooga, Tenn., via the main line of the L. & N. R. R. Co., from Cincinnati, Ohio, to Louisville, Ky., and the main line of the L. & N. R. R. Co., from Louisville, Ky., to Nashville, Tenn., and over the main line of the N. C. & St. L. Ry. from Nashville, Tenn., to Chattanooga, Tenn., is 450.9 miles, made up as follows:

	MILES.
L. & N. R. R. Co., Cincinnati, Ohio, to Louisville, Ky. . . . .	114.
L. & N. R. R. Co., Louisville, Ky., to Nashville, Tenn. . . . .	185.9
N. C. & St. L. Ry., Nashville, Tenn., to Chattanooga, Tenn. .	151.
Total . . . . .	450.9

That the average gross earnings per mile over the said route between said City of Cincinnati, Ohio, and the said City of Chattanooga, Tenn., in the year of 1907, was \$25,593.40.

(43) Your orators further show that said Commission in said case No. 1542, in its report and findings, which said report and findings are made a part of said order in said case found that the Cincinnati Southern Railroad is a single trunk line without branches running from Cincinnati, Ohio, to Chattanooga, Tenn.; that the main line of the L. & N. R. R. Co. extends from Cincinnati, Ohio, to Louisville, Ky., and from Louisville, Ky., to Nashville, Tenn.; that traffic from Louisville, Ky., to Chattanooga, Tennessee, passes through Nashville, Tenn., over the N. C. & St. L. Ry.; that for the year 1907 the gross earnings of the Cincinnati Southern Railroad were over \$26,000 per mile; that for the year 1907 the gross earnings of the L. & N. R. R. Co. were about \$11,000 per mile; that for the year 1907 the gross earnings of the N. C. & St. L. Ry. were \$10,000 per mile; that for the year 1907 the gross earnings of that portion of the line of the L. & N. R. R. Co. between Cincinnati, Ohio, and Louisville, Ky., were \$25,000 per mile; that for the year 1907 the gross earnings for that portion of the L. & N. R. R. Co. between Louisville, Ky., and Nashville, Tenn., were \$30,000 per mile; that for the year 1907 the gross earnings of the N. C. & St. L. Ry. between Hickman, Ky., and Chattanooga, Tenn.—a distance of 320 miles—were over \$20,000 per mile.

Your orators further show that the Commission in making said findings did so in language as follows:

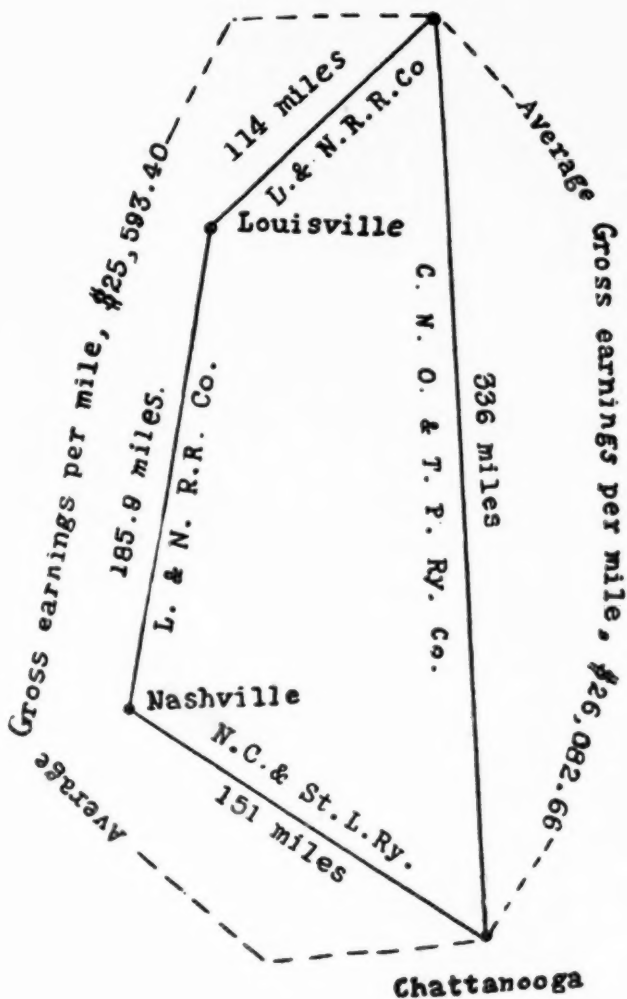
"The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville and Nashville extends from Cincinnati to Louis-

ville and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis, between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile." (18 I. C. C. Rep., p. 465.)

30 (44) Your orators further show that the average gross earnings per mile from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of the said L. & N. R. R. Co., from Cincinnati, Ohio, to Louisville, Kentucky, and from Louisville, Kentucky, to Nashville, Tennessee, thence over that portion of the main line of the said N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, for the year 1907, was \$25,593.40; that the distance by said route from Cincinnati, Ohio, to Chattanooga, Tennessee, through Louisville and Nashville as above set forth, is 450.9 —.

That the gross earnings per mile of said C. N. O. & T. P. Ry. Co. on its line from Cincinnati, Ohio, to Chattanooga, Tennessee, for the year 1907, was \$26,082.66, and that the distance from Cincinnati, Ohio, to Chattanooga, Tennessee, over the line of the C. N. & O. T. P. Ry. Co., as above set forth, is 336 miles, which said routes, said gross earnings per mile and said mileages are now herein shown as follows:

## cincinnati



Your orators further show that the net income per annum of said L. & N. R. R. Co. for the years 1903 to 1907, both inclusive, after deducting operating expenses (including maintenance), fixed charges, interest, rent, taxes and sinking fund payment, was



1903	.....	\$6,211,047
1904	.....	6,668,171
1905	.....	6,827,039
1906	.....	6,348,374
1907	.....	6,450,521

The above figures were a part of the record in said case No. 1542, but the net income of the said L. & N. R. R. Co. for the year 1908 was not in the record.

Your orators further show that the capital stock representing the balance of the property employed in and devoted to public service and use and for the public convenience not compensated under items of said fixed charges, interest, rents and sinking fund payment of the said L. & N. R. R. Co., for the years 1903 to 1907, both inclusive, was as follows:

1903	.....	\$60,000,000
1904	.....	60,000,000
1905	.....	60,000,000
1906	.....	60,000,000
1907	.....	60,000,000

Your orators further show that the respective amounts shown as net income per annum for the years 1903 to 1907, both inclusive, would produce a percentage return on the said amount of capital stock for said years, as follows:

*Percentage Return on Capital Stock.*

	Per cent.
1903	..... 10.35
1904	..... 11.11
1905	..... 11.38
1906	..... 10.58
1907	..... 10.75

Your orators further show that items above referred to for the year 1908 were not in the record in said case No. 1542.

(45a) Your orators further show that the sums mentioned below were credited to the Profit and Loss Account of said L. & N. R. R. Co. for the years ending June 30, 1903, to 1908, inclusive:

Balance to the credit of Profit and Loss Account, June 30, 1903	.....	\$8,292,710.22
33 Balance to the credit of Profit and Loss Account, June 30, 1904	.....	11,684,424.12
Balance to the credit of Profit and Loss Account, June 30, 1905	.....	14,899,106.26
Balance to the credit of Profit and Loss Account, June 30, 1906	.....	18,130,045.82
Balance to the credit of Profit and Loss Account, June 30, 1907	.....	20,827,512.88
Balance to the credit of Profit and Loss Account, June 30, 1908	.....	19,015,000.15

(45*b*) Your orators further show that in the year 1881 said L. & N. R. R. Co. declared a stock dividend to its stockholders of 100 per cent.

(45*c*) Your orators further show that the result of the operations of the L. & N. R. R. Co. for the years ending June 30, 1909 and 1910 are as follows:

	1909.	1910.
Gross earnings .....	\$45,425,891	\$52,433,382
Expenses .....	29,627,499	31,861,347
Net earnings .....	15,798,392	17,569,035
Taxes .....	1,437,992	1,602,632
Operating income .....	14,360,400	15,966,402
Other income .....	1,395,124	1,733,363
Total income .....	15,755,524	17,699,766
Interest, rents, etc. ....	7,167,589	7,286,510
Net profits .....	8,587,935	10,413,256

that the net profits of \$8,587,935 and \$10,413,256 are equivalent to 14.31 and 17.35 per cent., respectively, on said \$60,000,000 capital stock, as set forth in paragraph (45) hereof.

(46) Your orators further show that the schedule of rates complained of in said case No. 1542, from Cincinnati, Ohio, to Chattanooga, Tennessee, was said 76 cent schedule in effect over said Cincinnati Southern Railway, a single trunk line without branches, running from Cincinnati, Ohio, to Chattanooga, Tennessee, as an unjust and unreasonable schedule of rates as in and of itself; and that said complaint in said case No. 1542 was not a complaint against an unjust and unreasonable individual rate, nor a complaint against an unjust and unreasonable specific rate on a given article; but that said complaint in said case No. 1542 was a complaint against said 76 cent schedule of rates maintained by said Cincinnati Southern Railway, operated by said C. N. O. & T. P. Ry. Co., taken by itself as a single trunk line without branches running from Cincinnati, Ohio, to Chattanooga, Tennessee.

34 Your orators further show that said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry., or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, Kentucky, thence over the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee; that said complaint in said case No. 1542 was not a complaint as to any schedule of rates, joint rates or through rates, maintained by the said L. & N. R. R. Co. on its division, extending from Mobile, Alabama, to New Orleans, La., nor any of its numerous divisions or branches; that said complaint in said case No. 1542 was not a complaint as to any of the rates or schedules of rates joint rates or through rates maintained by said N. C. & St. L. Ry. on its division between Paducah, Kentucky, and Memphis, Tennessee, nor on any of its numerous divisions or branches.

Your orators further show that the complaint in said case No. 1542 was not directed against the return on the value of the property employed in and devoted to the public use and service and for the public convenience by said L. & N. R. R. Co. or said N. C. & St. L. Ry. or both of them.

(17) Your orators further show that although said complaint in said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry. or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, as more particularly set forth in paragraph (46) of this Bill of Complaint; yet said Commission tried case No. 1542 as if said Commission was called upon in said case No. 1542 to adjust the rates on the entire lines (including main line and branches) of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

Said Commission in adjusting the schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. in its report in said case No. 1542, used language as follows:

"Now, in adjusting the rates of the Louisville and Nashville or the Nashville, Chattanooga and St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?"

"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in 35 a degree contribute to the support of the branch line for the branch-line business when it reaches the main line is surplus traffic from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates up on the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it." (18 L. C. C. Rep., p. 465.)

Your orators further show that said Commission in adjusting the schedules of rates of said L. & N. R. R. Co. and said N. C. & St. L. Ry. in said case No. 1542, although the schedules of rates of said two companies were not complained of, nor were the schedules of rates of said two companies at issue in said case No. 1542, took into consideration the entire main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., the gross earnings per mile for 1907 of the L. & N. R. R. Co. being about \$11,000, and for the same year the gross earnings per mile of the N. C. C. & St. L. Ry. being less than \$10,000, and determined that said 70 cent schedule of rates should be a schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of said L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, thence by the main line to the said N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, a distance of 450.9 miles; and having thus adjusted a schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, thereupon determined and prescribed the said 70 cent schedule of rates as a schedule of rates to be maintained by the said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee,

over its single trunk line without branches, 336 miles in length, although the gross earnings per mile of the said C. N. O. & T. P. Ry. Co. for the year 1907 exceeded \$26,000; that said Commission by its order in said case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, based upon a schedule of rates adjusted for the main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., when said 70 cent schedule of rates thus adjusted for the said L. & N. R. R. Co. and said N. C. & St. L.

Ry. if applied to and prescribed for the single trunk line  
 36 railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, operated by said C. N. O. & T. P. Ry. Co., would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C. N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience, arbitrarily, oppressively, unconstitutionally, unlawfully and by mere fiat, deprive said parties aggrieved of their property without due process of law in the manner more particularly set forth in paragraph (36) of this Bill of Complaint; and deprive said parties aggrieved of their private property without just compensation in the manner more particularly set forth in paragraph (37) of this Bill of Complaint.

(48) Your orators further show that said Commission in its report in said case No. 1542 laid down the following rule:

"In In the Matter of Proposed Advances in Freight Rates, 9 I. C. C. Rep., 382, the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the Spokane case, 15 I. C. C. Rep., 376, the same subject was considered and the same conclusion reached. The last affirmance of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.*, 15 I. C. C. Rep., 555, in which the rule is stated by Clark, Commissioner, as follows:

"In the Spokane case, 15 I. C. C. Rep., 376, we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

"As before suggested, we cannot, in determining competitive rates, select that railroad which is the shortest or most advantageously situated, and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines."

"We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits." (18 I. C. C. R. 464.)

37 Your orators further show that as above set forth in paragraph (44) the average gross earnings per mile of the route

from Cincinnati, Ohio, to Chattanooga, Tennessee, via the L. & N. R. R. Co. and the N. C. & St. L. Ry. through Louisville and Nashville is approximately the same as the gross earnings per mile of the direct line from Cincinnati, Ohio, to Chattanooga, Tennessee, via the C. N. O. & T. P. Ry. Co., and that therefore, applying the above rule within its proper limits, the said two routes from Cincinnati, Ohio, to Chattanooga, Tennessee, should be treated as equal.

Your orators further show that said Commission in its report in said case No. 1542, failed to apply said rule within its proper limits, but as more particularly set forth in paragraph (47) of this Bill of Complaint, said Commission instead of limiting its consideration to the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, and the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, considered the entire lines, including main line and branches, of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

(49) Your orators further show that in said case No. 1542 no complaint was made against the unjustness nor unreasonableness of the schedule of rates from Louisville, Kentucky, to Chattanooga, Tennessee; nor of the unjustness nor the unreasonableness of the schedule of rates from other Ohio River crossings to Chattanooga, Tennessee; nor of the unjustness nor unreasonableness of the schedule of rates from Memphis, Tennessee, to Chattanooga, Tennessee; nor of the unjustness nor unreasonableness of the schedule of rates from Memphis, Tennessee, to Birmingham, Alabama; nor of the unjustness nor unreasonableness of the schedule of rates from the Ohio River to Atlanta, Georgia; nor of the unjustness nor unreasonableness of the schedule of rates from the east to Atlanta, Georgia; that notwithstanding there was no complaint against the schedules of rates as described above in this paragraph, and notwithstanding none of said described schedules of rates were at issue in said case No. 1542, said Commission arbitrarily tried said case No. 1542 as if the said schedules of rates as described above in this paragraph were complained of as being unjust and unreasonable; that said Commission in its report of said case No. 1542 used the following language with reference to the schedules of rates as described above in this paragraph:

38

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the dis-

tance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis and San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a re-opening of that contest.

"It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly  
39 be followed by similar reductions from the East as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory." (18 I. C. C. R. 462-463.)

Your orators further show that said Commission in its report in said case No. 1542 used language as follows:

"In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think some slight reductions should be made in the rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory." (18 I. C. C. R. 466 and 467.)

Your orators further show that said commission by its order in said Case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, based upon the numerous schedules of rates above described in this paragraph, which said 70 cent schedule of rates if applied to and prescribed for the single trunk line railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee,

operated by said C. N. O. & T. P. Ry. Co., would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C. N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience, arbitrarily, oppressively, unconstitutionally, unlawfully, and by mere fiat, deprive said parties aggrieved of their property without due process of law in the manner more particularly set forth in paragraph (36) of this Bill of Complaint, and deprive said parties aggrieved of their private property without just compensation in the manner more particularly set forth in paragraph (37) of this Bill of Complaint.

(50) Your orators further show that when the parties aggrieved tender to said C. N. O. & T. P. Ry. Co. shipments of said goods, wares, and merchandise under Classes 1, 2, 3, 4, 5 and 6, respectively, for transportation over said single trunk line without branches of said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga,

40 Tennessee, said parties aggrieved are entitled to have their said shipments of said goods, wares and merchandise transported by said C. N. O. & T. P. Ry. Co. over its said road from Cincinnati, Ohio, to Chattanooga, Tennessee, at freight rates no higher than will yield to said C. N. O. & T. P. Ry. Co. a reasonable return on the fair value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use and for the public convenience; your orators further show that the value of the property of the L. & N. R. R. Co. Co. and the N. C. & St. L. Ry. employed in and devoted to the public service and use and for the public convenience, and the schedule of rates from Memphis, Tennessee, to Chattanooga, Tennessee, and the schedule of rates from Memphis, Tennessee, to Birmingham, Alabama, and the schedule of rates from the east to Atlanta, Georgia, should not arbitrarily and by mere fiat control the question as to what schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, will yield to said C. N. O. & T. P. Ry. Co. a reasonable return upon the fair value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use and for the public convenience.

(51) Your orators further show that under the facts set forth in this Bill of Complaint, the undisputed facts in said case No. 1542, the grounds of complaint in said case No. 1542, findings of fact by said Commission in said case No. 1542, and the things which were complained of in said case No. 1542, and the things which were not complained of in said case No. 1542 as more particularly specified in paragraph (46) of this Bill of Complaint, that said Commission have given no reasons or rules of law why said C. N. O. & T. P. Ry. Co. should not be taken by itself, and no reasons why the property of the parties aggrieved should be taken without due process of law and why the private property of the parties aggrieved should be taken for public use without just compensation.

Your orators further show that in view of the uncontradicted fact that said 50 cent schedule of rates would make more than due returns to said C. N. O. & T. P. Ry. Co., to-wit, 40.66 per cent. per annum, on the value of its property devoted to and employed in the

public service and use and for the public convenience, that said Commission in violation of the limitations placed upon the exercise of its power, has required all shippers, including the parties aggrieved, to pay excessive freight rates from Cincinnati, Ohio, to Chattanooga,

41 Tennessee, over the Cincinnati Southern merely for the purpose of enabling some other road to make profits, and to enable some other road to maintain branches and to enable some other road to diffuse population and industries.

(52) Your orators further show that in said case No. 1542 complaint was made to said Commission that said 75 cent schedule of rates from Cincinnati, Ohio, to Chattanooga maintained by said Cincinnati Southern Railway a single trunk line with two termini and without branches, was unjust and unreasonable in and of itself; that two questions were thereby presented to said Commission, the first whether said 76 cent schedule of rates complained of produced an undue profit on the value of the property devoted to and employed in the public service and use and for the public convenience; and the second for said Commission to substitute for, in lieu of and in place of said 76 cent schedule of rates a new schedule of rates that would return to said C. N. O. & T. P. Ry. Co. so operating said single trunk line without branches between said two termini a fair and reasonable profit upon the value of its property devoted to and employed in the public service and use and for the public convenience and not in excess thereof.

Your orators further show that the correct rules of law as applicable thereto were as follows:

(a) That where a schedule of rates between two termini of a single trunk line without branches yields to the Railway Company operating said single trunk line without branches, excessive net profits on the value of its property devoted to and employed in the public service and use, and for the public convenience, that such schedule of rates is unjust and unreasonable in and of itself, and that the enforcement of such rates to the amount of said excess is the taking of property without due process of law and the taking of private property for the public use without just compensation; and on complaint filed with the Interstate Commerce Commission it is the duty of said Commission to apply said rule of law.

(b) That where such complaint has been sustained by the Interstate Commerce Commission that a schedule of rates between the two termini of a single trunk line without branches is unjust and unreasonable in and of itself and returns an excessive net profit on the value of the property devoted to and employed in the public service and use and for the public convenience, it is a rule of law that the Interstate Commerce Commission shall prescribe a new schedule of rates which will yield a fair net profit to the Railway Company operating said trunk line with two termini without branches.

42 upon the fair value of its property devoted to and employed in the public service and use and for the public convenience and not in excess thereof.

(c) That said Interstate Commerce Commission in prescribing such new schedule of rates is without power, and acts beyond the



limitations upon its powers if it prescribes a new schedule of rates which will yield to said Railway Company operating said single trunk line with two termini without branches a profit in excess of a reasonable net profit on the fair value of the property devoted to and employed in the public service and use, and for the public convenience; and said Commission is without power in prescribing such new schedule of rates which will yield the said Railway Company operating a single trunk line with two termini without branches a profit in excess of a reasonable net profit on the fair value of the property devoted to and employed in the public service and use and for the public convenience and has no power so to do on the grounds that said Commission will thereby enable some other road to make profits and to enable some other road to maintain branches and to enable some other road to diffuse population and industries.

(d) That said Interstate Commerce Commission in determining what new schedule of rates will produce a reasonable net profit to the complained-of Railway Company operating a single trunk line with two termini without branches on the fair value of the property devoted to and employed in the public service and use and for the public convenience, may consider as evidentiary facts bearing thereon schedules of rates on other roads operated under substantially similar circumstances and conditions, but said schedules of rates on said other roads are merely evidentiary facts, and are not to be given controlling and decisive influence, and such schedules of rates on such other roads are not to be prescribed for the complained of Railway Company for the purpose of enabling such other roads to make profits or to enable such other roads to maintain branches or to enable such other roads to diffuse population and industries.

(53) Your orators further show that said Commission failed and refused to apply said rules of law and on the contrary in determining what would be a schedule of rates for said C. N. O. & T. P. Ry. Co. between said two termini of said Cincinnati Southern Railway, a single trunk line without branches, fixed rates to make profits for said L. & N. R. R. Co. and said N. C. & St. L. Ry. and to enable them and each of them to maintain branch lines and to enable them and each of them to diffuse population and industries.

(54) Your orators further show that said Commission acted in violation of the limitations imposed by the Constitution of the United States, particularly the limitations imposed by Article 5 of the Amendments to the Constitution of the United States, and acted beyond its delegated powers and evidenced such unreasonable exercise of its powers as to be substantially without and beyond such powers and considered matter as the fact to be proved, which were mere evidentiary facts and considered as evidence that which under the proper rules of law was no evidence whatsoever; and arbitrarily and by mere fiat refused to prescribe said 60 cent schedule of rates and applied erroneous rules of law, all as appears from said Exhibit "A" hereto attached and made a part hereof, and to which particular attention is now called.

(a) Said Commission erroneously attempted to justify its action

in not prescribing said 60 cent schedule of rates that the rates from Cincinnati to Chattanooga and Louisville to Chattanooga had been the same for the last twenty-eight years; that the distance is substantially the same, and that said relation in rates would undoubtedly be maintained in the future; that the language of said Commission was as follows:

"The rate from Cincinnati and Louisville to Chattanooga has been the same for the last twenty-eight years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future." (18 L. C. C. R., 462.)

Your orators further show that said C. N. O. & T. P. Ry. Co. has no vested right in a particular schedule of rates, and that said parties aggrieved should not be barred by lapse of time from having substituted a 60 cent schedule of rates in place of a 76 cent schedule of rates, which latter schedule of rates has been condemned by the Commission as unjust and unreasonable in said case No. 1542.

Your orators further show that said parties aggrieved have a right to any and all natural advantages that they may have in the existence and location of said Cincinnati Southern Railway, a single trunk line with two termini and no branches extending from Cincinnati, Ohio, to Chattanooga, Tennessee, and that it is beyond the powers of said Commission to take away said natural advantages.

44 Your orators further show that said parties aggrieved should not be deprived of said 60 cent schedule of rates because shippers in Louisville may or may not on complaint filed have a right to compel the L. & N. R. C. Co. and its connecting carrier, the N. C. & St. L. Ry., to maintain through or joint rates from the city of Louisville, Kentucky, to the City of Chattanooga, Tennessee, and that the conjecture of the Commission that this relation in rates will undoubtedly be maintained is no justification for depriving said parties aggrieved, from a just and reasonable schedules of rates from Cincinnati, O., to Chattanooga, Tenn., over the Cincinnati Southern Railway, considering the value of the property of the C. N. O. & T. P. Ry. devoted to and employed in the public service and use, and for the public convenience.

(b) Said Commission erroneously attempted to justify its action in not prescribing said 60 cent schedule of rates, that whatever reduction might be made from Cincinnati will be met by corresponding reductions from other Ohio River crossings; that rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and that this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati; that the language of said Commission was as follows:

"Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and this relation will undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati." (18 L. C. C. R., 462.)

Your orators further show that said parties aggrieved have a right

to any and all natural advantage that may have in the existence and location of said Cincinnati Southern Railway, a single trunk line with two termini and no branches, extending from Cincinnati, Ohio, to Chattanooga, Tennessee, and that it is beyond the power of said Commission to take away said natural advantages merely because other roads at other Ohio River crossings may have to make corresponding reductions in order to preserve their present relations, there being no facts in the record in said case No. 1542 to show or tending to show that by so doing the said other roads would not earn a fair return on the value of their property devoted to and employed in the public service and use, and for the public convenience.

45 (c) Said Commission erroneously attempted to justify its action in not prescribing said 60 cent schedule of rates that said Commission in the original cases, to-wit, Nos. 322 and 323, ordered reductions to many other points besides Chattanooga; that while Chattanooga is the only Southern point of destination referred to in the complaint in case No. 1542, that it was frankly stated that the purpose was to obtain a general reduction in the Southeastern territory; that no reason was apparent why if the Commission adhered to its formed decision in the case of Chattanooga, it ought not to do the same in the case of other localities in said territory; that it was to be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reductions to Chattanooga; that originally the same rate had been made to Atlanta from Louisville as was made from Baltimore; that after the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and that the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile although the distance was shorter; that at the present time the rate per mile is greater in the case of Chattanooga than in the case of Atlanta; that defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time on the following grounds:

That the reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the North were too high in comparison with Birmingham and Montgomery; that by that re-adjustment Atlanta was made the same as Montgomery, and the difference between Atlanta and Birmingham reduced. Your orators further show that said Commission then continued as its reason that the distance from Memphis to Birmingham is 251 miles and that the distance from Memphis to Chattanooga is 300 miles; that the distance from Cincinnati to Chattanooga is 336 miles; that the rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati in recognition of the shorter distance and that the St. Louis and San Francisco Railway insists that the rates from Memphis to Birmingham should not materially exceed the rate from Memphis to Chattanooga; that this seems reasonable in view of the fact that the distance is fifty miles shorter; that if at the time of said case No. 1542 this rate from Cincinnati to Chattanooga is reduced that  
46 it will in all probability carry with it a reduction from Memphis to Chattanooga, and that this will involve a correspond-

ing reduction from Memphis to Birmingham, and that this will create the same discrimination out of which the reduction of 1905 came; that this would mean a re-opening of said contest; that it should be remembered that any reduction from the North to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East, as was the case in 1905; that it is apparent to make any considerable change in the rate from Cincinnati to Chattanooga will work a lowering in rates throughout the entire Southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory; that the language of said Commission was as follows:

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rule was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the former basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time for the following reasons:

"The reduction of 1905 grew out of the claim upon the part of Atlanta that its rates from the North were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis and San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is fifty miles shorter. If now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the North to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East, as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory." (18 I. C. C. R., 462-463.)

Your orators further show that said parties aggrieved should not be deprived of a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, that would yield said C. N. O. & T. P. Ry. Co. more than a reasonable return upon the value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use, and for the public convenience, because said Commission finds no apparent reason why if it adhered to its former decision as to the rates from Cincinnati, Ohio, to Chattanooga, Tennessee, why it ought not to do the same in the case of other localities in said territory; that the shippers of Cincinnati, including the parties aggrieved, are entitled to a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, that will not yield to said C. N. O. & T. P. Ry. Co. more than a reasonable return upon the fair value of the property the C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use and for the public convenience, even though the establishment of such a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, makes it necessary for the Commission to prescribe lower just and reasonable rates than now in effect to other points in the southern territory south of Chattanooga, Tennessee.

Your orators further show that the parties aggrieved should not be denied justice because the Commission might be called upon to render justice to communities in the South other than Chattanooga, Tennessee.

Your orators further show that the parties aggrieved should not be deprived of said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, because of the conjecture on the part of the Commission that there might be a corresponding reduction made in the rates from Memphis, Tennessee, to Chattanooga, Tennessee, and in the rates from Memphis, Tennessee, to Birmingham, Alabama.

Your orators further show that the parties aggrieved are entitled to a just and reasonable schedule of rates over the Cincinnati Southern Railway taken by itself, and should not be deprived of said 60 cent schedule of rates because of the conjecture of the Commission that if said 60 cent schedule of rates was established from Cincinnati, Ohio, to Chattanooga, Tennessee, might cause a reduction in the rates from Cincinnati, Ohio, to Atlanta, Georgia, which said reduction from Cincinnati, Ohio, to Atlanta, Georgia, might be followed by a reduction in the rates from the East to Atlanta, Georgia.

Your orators further show that the parties aggrieved should not be deprived of said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, because of the conjecture of the Commission that to make any considerable change in the rates from Cincinnati, Ohio, to Chattanooga, Tennessee, will work a lowering in rates throughout the entire southern territory, or produce a change in the relation of rates; that had the Commission prescribed said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, and had thus as conjectured, produced change in the relation of rates in the southern territory, then on complaint made said Commission has power to fix just and reasonable rates, and the complainants in said case No. 1542 and the parties aggrieved, should not be deprived of justice because of any inconvenience to the Commission in hearing just complaints.

Your orators further show that the parties aggrieved should not be done an injustice and be deprived of said 60 cent schedule  
49 of rates because some other common carriers subject to the act to regulate commerce and whose lines do not reach either Cincinnati, Ohio, or Chattanooga, Tennessee, might not make a change in the relation of rates to correspond with the said 60 cent schedule of rates, provided said 60 cent schedule of rates was established from Cincinnati, Ohio, to Chattanooga, Tenn.

(54a) Your orators further show that there was no evidence in said case No. 1542 to show or tending to show, or facts within the cognizance of said Commission, nor did the Commission in its report in said case make any finding, that had the C. N. O. & T. P. Ry. Co. been ordered to establish and maintain said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, and because thereof other carriers correspondingly lowered their rates as conjectured by the Commission, that the said conjectured lower rates would have yielded said other carriers less than a reasonable return upon the fair value of the property which said other carriers employ in and devote to the public service and use and for the public convenience.

(54b) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the Railroad Commissions of most States in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances." (18 I. C. C. R., 466.)

Your orators further show that the above is no sufficient ground to arbitrarily and by mere fiat deprive the shippers of Cincinnati, including the parties aggrieved, of their property and just right because the said roads in the South, with rare exceptions, are not single trunk lines between two termini without branches, but on the contrary, said roads, with rare exceptions, consist of main lines, with numerous branches, and the gross earnings per mile on said roads, with rare exceptions, are less than the net earnings per mile of the said Cincinnati Southern Railway, shown in pare-

graph (20) hereof, a single trunk line road with but two termini and no branches; that the circumstances and conditions under which they are operated are totally dissimilar from those under which the Cincinnati Southern Railroad is operated.

50 (55) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans and Texas Pacific in the year 1907 over two-thirds of the tonnage was delivered to it by its connections, the most of it hauled as a through transaction from Cincinnati to Chattanooga, or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn into this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the City of Cincinnati were operating this property itself it is by no means certain that the apparently undue profit of today might not be a deficit." (18 I. C. C. R., 465.)

Your orators further show said Commission in said case No. 1542 held and found as a matter of fact that said C. N. O. & T. P. Ry. Co. and "its operation is in fact entirely distinct from that of the Southern Railway" (18 I. C. C. R., 457); that said Commission also held and found as a matter of fact that "the officers of the Southern Railway have no control whatever over those of the Cincinnati, New Orleans and Texas Pacific and could not legally dictate the action of the latter company" (18 I. C. C. R., 457); that said Commission also held and found as a matter of fact as to said Cincinnati Southern that "this property to-day is unique among railroads in the South" (18 I. C. C. R., 461); that said Commission also held and found as a matter of fact and as a proper rule to be applied thereto, as follows: "We must under this construction of the law dispose of this case as though these two companies (the C. N. O. & T. P. Ry. Co. and the Southern Railway Co.) were distinct in fact as well as in name and in operation." (18 I. C. C. R., 457.)

Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations of its powers deprived the parties aggrieved of their property and just rights upon the mere conjecture that the prosperity of the C. N. O. & T. P. Ry. Co. might be due to the ability of the Southern Railway to turn into said road traffic; and upon the mere conjecture that the undue profits of said C. N. O. & T. P. Ry. Co. might not exist if the City of Cincinnati operated said Cincinnati Southern Railroad itself.

51 Your orators further show that said Commission arbitrarily, and by mere fiat, deprived said parties aggrieved of their property and just rights upon mere conjectures of said Commission, although said City of Cincinnati had parted with its right to operate said Cincinnati Southern, and that the matter stood exactly as though said Cincinnati Southern had been built by private capital; said findings of fact by said Commission in said case No. 1542 being in the following language: "However this may be, the



City has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital." (18 I. C. C. R., 464.)

(56) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points." (18 I. C. C. R., 464.)

Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its power and without legal right and unjustly deprived the parties aggrieved of their property and just rights merely because Chattanooga is not complaining of unfair treatment as compared with other southern points; that the time to deal with that problem will arise when complaints, if any, are made to said Commission by any person injured; that the question of Chattanooga not complaining of unfair treatment as compared with other southern points was not at issue in said case No. 1542, and because not at issue in said case that it was mere exercise of arbitrary power on the part of said Commission to deprive the parties aggrieved of their property, just rights, and adequate remedy.

(57) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"Some indignation was expressed by several witnesses upon the part of the City of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad, that property was not more devoted to the interests of the City of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present,

52 it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer, and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities and the relation of rates would have continued the same. However, this may be, the city has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital." (18 I. C. C. Rep., 464.)

Your orators further show that the parties aggrieved are entitled to the benefit of a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, via the Cincinnati Southern, even though when the Commission fixes a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, via the Cincinnati Southern, other railroads might also establish just and reasonable schedules of rates between other communities is no ground for depriving the parties aggrieved of the benefit of a just and reasonable schedule of freight rates from Cincinnati, Ohio,



to Chattanooga, Tennessee, via the Cincinnati Southern, that will yield no more than a fair profit upon the fair value of the property of said C. N. O. & T. P. Ry. Co. employed in and devoted to the public service and use and for the public convenience.

(58) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"Cincinnati is 114 miles northeast of Louisville. Previous to the construction of the Cincinnati Southern all business for Chattanooga and the south and southeast passed through Louisville, and the rate was a differential above that from Louisville. Cincinnati was therefore obliged to pay upon all traffic to this its best market a higher transportation charge than its rivals upon the Ohio River. The purpose of constructing the Cincinnati Southern was to obtain a line from Cincinnati to Chattanooga which should be no longer than the line from Louisville, and which would therefore insure to that city the same rate to Chattanooga and all points in the south and southeast reached through that gateway which was enjoyed by Louisville. Immediately upon the opening of the Cincinnati Southern the rate from Cincinnati to Chattanooga was made the same as that from Louisville, and this relation has ever since been maintained; so that the city to-day, in addition to the profit upon its investment of  $11\frac{1}{2}$  per cent., secures all the advantages contemplated by the construction of the railroad." (18 L. C. C. Rep., 460-461.)

Your orators further show that the parties aggrieved are entitled to all the benefits accruing from the existence and location of the Cincinnati Southern Railroad, whatever may have been the original purpose in constructing said road, and that it is beyond the power of said Commission and beyond the limitations on the powers of said Commission to deprive the Cincinnati shippers, including the parties aggrieved, from all the benefits of said the Cincinnati Southern Railroad, irrespective of the original purpose of constructing the said Cincinnati Southern Railroad, and that to deprive the parties aggrieved, of all the benefits of the existence and location of the said the Cincinnati Southern Railroad is to arbitrarily, oppressively, unlawfully, unjustly and by mere fiat, deprive the parties aggrieved, of their property and just rights contrary to the Constitution of the United States and the Amendments to the Constitution to the Constitution of the United States, and contrary to the provisions of said act to regulate Interstate Commerce and the various acts amendatory of and supplemental thereto and of other provisions of other statutes of the United States and is such an unreasonable exercise in such an unreasonable manner of the powers conferred upon said Commission as not to be within the powers of said Commission and not even within the shadow of the powers conferred on said Commission.

(59) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for

lower rates; and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past railways have been able to introduce various economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight one mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices." (18 I. C. C. R., 466.)

54 Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers deprived the parties aggrieved of their property and just rights upon mere conjecture as to what the future might bring about.

(59a) Your orators further show that said Commission, in said case No. 1542, laid down the following:

"The testimony shows that in order to handle the business offering, it has been necessary already to expend large sums in the improvement of the roadway and structure, and that further large sums must be expended in the future. This money, say the defendants, can only be obtained from income from operation, and hence a sufficient rate should be allowed to permit the making of these necessary additions.

"This position is not well taken. A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, but it is not entitled to have that property paid for by the public. This Commission has so decided in *Central Yellow Pine Asso. v. I. C. R. R. Co.*, 10 I. C. C. Rep., 505, and the Supreme Court has affirmed the correctness of that holding. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S., 411. If these stockholders have entered upon this enterprise without the means to provide necessary funds with which to carry it on, that can be no reason for the imposition of rates otherwise unreasonable." (18 I. C. C. R., 462.)

Your orators further show that for the six years—1903 to 1908, both inclusive—as more particularly set forth in paragraph (20) hereof, said C. N. O. & T. P. Ry. Co. expended out of earnings for permanent improvements and new rolling stock the sum of \$10,095,637.79, a yearly average of \$1,682,606.30.

Your orators further show that as set forth in paragraph (27a) hereof, had the said 70 cent schedule of rates been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903 to 1908, both inclusive, the annual average net profit of said C. N. O. & T. P. Ry. Co. would on the same tonnage have been reduced annually by the comparatively trifling sum of \$12,000.

Your orators further show that, although said Commission laid down the sound rule of law as above quoted in this paragraph, to-wit, that said C. N. O. & T. P. Ry. Co. was not entitled to a sufficient rate to permit said company to make additions by way of permanent improvements and pay same out of earnings, yet if

55 the said 70 cent schedule of rates had been applied to the business of said C. N. O. & T. P. Ry. Co. for the years 1903

to 1908, both inclusive, the Commission, by such order establishing such a schedule of rates, would have authorized and empowered said C. N. O. & T. P. Ry. Co. to take from the public to pay for the additions aforesaid annually the difference between said \$1,682,606.30 and said \$12,000, namely, \$1,670,606.30; that said Commission, by its order establishing said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, did thereby authorize and empower said C. N. O. & T. P. Ry. Co. to take from the public to pay for future additions as aforesaid annually, substantially and approximately said difference between \$1,682,606.30 and said \$12,000, namely, \$1,670,606.30; that said Commission arbitrarily, oppressively, unjustly, unlawfully and unconstitutionally failed to apply the rule of law as laid down by said Commission; that said Commission thereby acted arbitrarily and merely within the shadow of the powers and duties given to and imposed on said Commission to establish a just and reasonable schedule of rates, but in violation of the substance of said powers and duties given to and imposed on said Commission.

(60) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Company, but also with reference to other companies whose rates are necessarily affected by these; otherwise stated the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company just as it would be the misfortune of some other company if it could not show as favorable earnings." (18 L. C. C. R., 462.)

Your orators further show that said Commission refused to sustain the claims of the defendants in reference to the financial necessities of said C. N. O. & T. P. Ry. Co., but did sustain the contention of the defendants as to the balance of said paragraph.

Your orators further show that said rule as applied by said Commission was an erroneous rule of law and if said Commission  
56 had applied the correct rule of law that said Commission would have in no event established a schedule of rates to exceed said 60 cent schedule of rates:

Your orators further show that said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers deprived the parties aggrieved of their property and just rights.

(61) Your orators further show that said Commission in its report in said case No. 1542 laid down the following:

"We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive. In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think that some slight reduction should be made in

these rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory. In the readjustment of 1905 rates to Chattanooga from the Ohio River were not reduced, although those from the east were. We are of the opinion that the present rates are unreasonable, and that rates should be established upon the numbered classes, not exceeding in cents per 100 pounds the following:

Classes .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

and it will be so ordered." (18 I. C. C. R., 466-467.)

Your orators further show that in and by said paragraph said Commission was guided by erroneous rules of law; that it was the duty of said Commission to act with cold neutrality in dealing with the undisputed and admitted facts in said case No. 1542; that it was not an issue in said case to make widespread and far-reaching reductions in rates; that the sole question at issue before said Commission in said case No. 1542 was on its findings of fact to declare said 76 cent schedule of rates unjust and unreasonable and on its findings of fact to substitute therefor in no event a schedule of rates to exceed said 60 cent schedule of rates; that it was beyond the power of said Commission to refuse to afford the complainants just and adequate relief in said case No. 1542 by the mere fact that the effect of the introduction of a 60 cent schedule of rates might be far-reaching; that said conclusion of said Commission that said 76 cent schedule of rates of itself was not clearly excessive was  
 57 in direct contradiction of the finding of fact of said Commission, that said 76 cent schedule of rates was in and of itself unjust and unreasonable; that it was not a sound rule of law for said Commission to make slight reductions in schedules of rates but it is a sound rule of law that said Commission has power to and should substitute a new, just and reasonable schedule of maximum rates, which rule of law said Commission failed to apply and applied an erroneous rule of law; that said Commission in its said findings failed to find that said 70 cent schedule of rates would be just and reasonable maximum rates and that it was beyond the powers of said Commission to substitute a new schedule of rates without said Commission finding that said new schedule of rates would be just and reasonable.

Your orators further show that said Commission thereby acted arbitrarily, unlawfully, unjustly and oppressively and beyond its powers and beyond the limitations on its powers and acted by mere fiat and exercised its powers in such an unreasonable manner as not to be within the powers of said Commission and not even within the shadow of the powers conferred on said Commission.

(62) Your orators further show that said Commission in its said report, findings, conclusions, order and requirement in said case No. 1542, wholly failed and omitted to find that said ordered 70 cent schedule of rates was a just schedule of rates, or that said 70 cent schedule of rates was a reasonable schedule of rates, or that

said 70 cent schedule of rates was a just and reasonable schedule of rates.

(63) Your orators further show that Section 5 of said Act to regulate commerce provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

Your orators further show that, although it is unlawful for a common carrier to enter into any contract, agreement or combination with any other competing common carrier or carriers of less financial strength to divide with said competing common carrier or carriers the aggregate or net proceeds of their earnings or any portion thereof, yet the effect of the Commission's finding and the grounds thereof, as more particularly set forth in paragraph (48) hereof, in spirit and in effect, is a pooling of earnings and the result of the action of said Commission on the shipping public, including the parties aggrieved is the same as if there was a contract, agreement or combination between the said C. N. O. & T. P. Ry. Co. and the L. & N. R. R. Co. and the N. C. & St. L. Ry. and other southern roads for a pooling and division of earnings, and therefore in violation of said Sec. 5 and beyond the powers of said Commission and beyond the limitations on the powers of said Commission.

## VI.

(64) Your orators further show that the facts set forth below, in the concurring opinion of Commissioner Clements in which Commissioner Lane joined, were undisputed and admitted facts in said case No. 1542, and that the rules of law laid down by said Commissioner Clements as set forth below in said concurring opinion were sound rules of law applicable to said case No. 1542, and that said commission in its said report which was made a part of the order in said case No. 1542, arbitrarily, oppressively, unlawfully, unjustly and unconstitutionally ignored said facts and laid down rules of law contrary thereto and thereby deprived the said parties aggrieved of their property and just rights and of the full and adequate relief and remedy to which complainants and the parties aggrieved were and are entitled.

Your orators further show that they hereby adopt said concurring opinion of said Commissioner Clements as a part of this their Bill of Complaint as bearing on a just and reasonable schedule of rates and as showing to this court the admitted facts and correct rules of law applicable thereto in this case, the same being as follows, to-wit:

"CLEMENTS, *Commissioner*, concurring:

"When concurring in the order of the Commission, reducing the rates involved from Cincinnati to Chattanooga, because, although the reductions are slight, they afford some relief, I am convinced that the reductions made do not meet the just demands of the complaint, in view of the facts shown. Nor do I agree to all the statements or the reasoning or conclusions of the foregoing report. And the attempt in these cases, which involve rates from Cincinnati and Chicago to Chattanooga only, to review the report and conclusions in the former cases, which were directed to rates to

59 eight representative southeastern cities, including Chattanooga, makes it necessary in my view to call attention to many matters which either have been overlooked or only partially treated in the present report and which relate to the general adjustment of rates from the northwest to the southeast. \* \* \*

"I have suggested that complainants are entitled to greater relief than that proposed in the report. There is no doubt of the flourishing condition of the Cincinnati, New Orleans & Texas Pacific and in my mind none that it can operate with a reasonable profit under further reduced rates or that by such rates a hardship will be worked upon the carriers in the other and longer route between Cincinnati and Chattanooga. The Cincinnati, New Orleans & Texas Pacific is a leasing company, capitalized at \$5,500,000, consisting of \$2,500,000 preferred and \$3,000,000 common stock. The present rental of the Cincinnati Southern is slightly in excess of \$1,000,000 per annum. The history of this property is set out at some length in the report. Looking to a comparison of financial conditions it appears that for the years 1904, 1905, 1906, and 1907, gross earnings per mile from operations of the Cincinnati, New Orleans & Texas Pacific and Southern Railways and Groups 1, 2, and 3 of the Commission's system of grouping for statistical purposes, were as follows:

	1904.	1905.	1906.	1907.
Cin., N. Orleans & Tex. Pac. ....	20,193	21,730	21,965	25,831
Southern .....	6,295	6,687	7,273	7,506
Group 1 .....	13,994	14,511	15,528	16,314
Group 2 .....	20,187	20,752	22,517	24,538
Group 3 .....	11,863	12,483	13,789	14,922

"Groups 1, 2, and 3 include all of New England, New York, Pennsylvania, New Jersey, Delaware, Maryland, and a portion of West Virginia, also Ohio, Indiana, and the southern peninsula of Michigan, and are by far the greatest revenue producers. As to other seven groups the Cincinnati, New Orleans and Texas Pacific produces in every case gross revenues per mile three to four times greater. It will be observed that the Southern Railway produces not one-third the gross revenue per mile of the Cincinnati Southern. The average gross earnings per mile of the railroads of the whole United States for the year 1906 was \$10,460. The density of traffic on the Cincinnati, New Orleans & Texas Pacific has gradually increased from two in

1894 to nearly three times in 1906 the average density of all the roads in the United States, and from 1904, when the density per mile of line about equaled the average in Group 2, which includes Delaware, New Jersey, Maryland, the greater part of Pennsylvania and New York, and a small portion of West Virginia, the increase on the Cincinnati, New Orleans & Texas Pacific has been gradual until in 1906 this road's density was materially greater than that of Group 2. During these years this line has consistently enjoyed about five times the density per mile of the Southern Railway, by which it is controlled. The increase in density of traffic on the Cincinnati Southern was 169 per cent. greater in 1906 than in 1904, as compared with 115 per cent. average increase of all roads in the United States during that period, or 54 per cent. in favor of the Cincinnati, New Orleans & Texas Pacific in the matter of increase.

"The following table shows number of tons of freight carried per mile of line by the Cincinnati, New Orleans & Texas Pacific as compared with the Southern Railway, Groups 2 and 3, and the average in the United States:

	1904.	1905.	1906.
Cin., N. Orleans & Tex. Pac. ....	2,038,497	2,163,643	2,636,587
Southern .....	449,203	467,477	527,031
Group 2 .....	2,059,168	2,200,372	2,443,924
Group 3 .....	1,379,785	1,457,855	1,713,615
Average, United States .....	829,476	861,396	982,401

"The ratio of expenses to operating income of the Cincinnati, New Orleans & Texas Pacific for 1904, 1905, and 1906 is shown in the following table, as well as a comparison with the Southern Railway and Groups 3 and 5, which groups cover the territory involved in these complaints:

	1904.	1905.	1906.
Cin., New Orleans & Tex. Pac. ....	73.41	73.65	72.98
Southern .....	70.30	69.99	71.35
Group 3 .....	74.52	73.68	70.57
Group 5 .....	70.66	71.34	73.04

\* \* \* \* \*

"The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Deatur division \$25,227.72, and the Cincinnati to Louisville division \$24,618.15. The average of the whole system was lowered by numerous unprofitable branch lines, one of which earned only \$718.48. The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system.

To a certain extent this is true, but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.

"The gross earnings of the Nashville, Chattanooga & St. Louis in that year averaged \$9,882 per mile and the earnings of its main line from Hickman, Ky., to Chattanooga were \$20,295 per mile.

"Numerous other statistics both from this record and from the Commission's files might be produced but I shall merely point out by way of comparison that the first class rate from New York to Chicago, a distance of about 900 miles, is 75 cents, or 1 cent less than the Cincinnati-to-Chattanooga rate for 336 miles, and the local first class rate from Chicago to Cincinnati, a distance of 298 miles, is 40 cents. Objection possibly will be made to this comparison because the carriers do not operate in the same general territory. The only object, however, in so confining a comparison is to consider the respective rates in the light of substantially similar circumstances and conditions of carriage. Reference to tables of earnings, density of traffic, etc., herein will show that these rates are made under transportation conditions less favorable in these respects than the rate from Cincinnati to Chattanooga. Only Group 2, embracing the eastern half of the New York-Chicago haul approximates the defendant's high standard of general transportation conditions, and Group 3 is far below that standard. Under these circumstances this comparison with the highly competitive Official Classification territory should go far toward convincing that the rates in issue are greatly in excess of a reasonable charge.

"It is stated in the report that—

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."

"Plainly then some very substantial reasons should be advanced for denying the relief asked for, bearing in mind, of course, the general conditions in this territory and having due regard for the interests of other routes. This suggestion in my opinion is not met by apprehension of injustice to the Louisville & Nashville and Nashville, Chattanooga & St. Louis, whose financial condition is not shown to require less remedial action, or by the reasoning by which it is sought to show that the middle west magnifies its troubles or by which the eastern carriers are absolved from all responsibility for the existing conditions. \* \* \*

"As already stated, the present rates from Cincinnati to Chattanooga have been in effect for twenty-eight years, although Nashville, Atlanta, and other southeastern points have had relief, more or less justified in theory and in the degree, extended in the different cases. Reductions to Chattanooga have been made from the east and in conjunction with one of the defendants in this proceeding. Looking to the history of the rates from these sections there is no doubt that as to Chattanooga from the west something is radically wrong, and in disposing of the complaint adequate relief should be given. I do not believe this would result in a wholesale disturbance of just rates to points throughout the south. So far as it would aid in the correc-



tion of unjust rates to other places the result is not to be deplored. Judged by any one of the consideration- recognized either by the Commission or the courts in determining the reasonableness of transportation charges, the rates complained of exceed the limit of reasonableness to a greater extent than is declared in the report and should be dealt with accordingly.

"I am authorized by Commissioner Lane to state that he concurs in these views." (18 I. C. C. R. 467-477.)

(65) Your orators further show that groupings of the railroads of the United States as fixed by the Interstate Commerce Commission and referred to in paragraph —(64) hereof, are indicated on drawing hereto attached and marked exhibit "C" and made a part hereof.

(66) Your orators further show that the facts alleged in this Bill of Complaint are all the material facts showing that said 76 cent schedule of rates was unjust and unreasonable; that the facts alleged in this Bill of Complaint are all the material facts showing that said 60 cent schedule of rates would be just and reasonable; that there were no other material facts before said Commission in said case No. 1542 other than these set forth in this Bill of Complaint; that there were no material facts within the cognizance of said Commission in said case No. 1542 except the facts set forth in this Bill of Complaint.

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## VII.

(67) Your orators further show that said C. N. O. & T. P. Ry. Co., pursuant to said order in said case No. 1542, did publish and file with the Interstate Commerce Commission, effective as and of the 15th day of July, 1910, a schedule of rates in cents per hundred pounds, to-wit:

Class .....	1	2	3	4	5	6
Rates .....	70	60	53	44	38	29

Your orators further show that said C. N. O. & T. P. Ry. Co. has since said 15th day of July, 1910, put said schedule of rates into full force and effect, and charged and collected same from said parties aggrieved, and threatens to continue said schedule of rates for at least two years from the 15th day of July, 1910, and to so charge and so collect.

## VIII.

(68) Your orators further show that said order in said case No. 1542 is null and void and of no validity whatsoever, and that said Commission was and is without any power or authority in law to make the same or to enforce the same; and said Commission exceeded its powers in that behalf; that said decision and order of said Commission is contrary to law and is in violation of the Constitution of the United States, particularly Article 5 of the Amendments to the Constitution of the United States in that the effect of the enforcing of said order is to deprive the parties aggrieved of their property without due process of law, and the taking of private

property of the parties aggrieved without just compensation; that said order and the findings of fact and conclusions thereon which were made part and parcel of said order, all as set forth in Exhibit "A" hereto attached and made part hereof, were based upon such unreasonable exercise of power on the part of said Commission as to be merely within the shadow of the powers conferred on said Commission and to be in direct violation of the substance of the powers conferred on said Commission; that said Commission evaded its duty to give substantial relief to the complainants in said case No. 1542 for its own mere convenience and gave complainants a mere shadow of relief and ignored the measure of justice due complainants; that said Commission acted upon conjectures and applied erroneous rules of law and that said Commission also found some sound rules of law and failed to apply said sound rules of law, and that said Commission acted by mere fiat and acted arbitrarily;

that said Commission having before it the fact that said C. N. O. & T. P. Ry. Co. under said 76 — schedule of rates was earning 44.43 per cent. per annum on the value of the property employed in and devoted to the public service and use and for the public convenience by arbitrary action, by such unreasonable exercise of its powers, by mere fiat, arbitrarily, unjustly, unlawfully and unconstitutionally prescribed a new schedule of rates, to-wit: said 70 cent schedule of rates, which will yield to said C. N. O. & T. P. Ry. Co. 44.18 per cent. per annum on the said value of its said property, and that said reduction was a mere pretense of action on the part of said Commission, and while pretending to give complainants in said case No. 1542 relief was giving said complainants the mere shadow of relief, and merely reduced the annual revenue of said C. N. O. & T. P. Ry. Co. by the comparatively trifling sum of \$12,000 a year, being a mere one-fourth of one per cent. per annum on the value of its said property; that said Commission wholly failed to find that said 70 per cent. schedule of rates ordered by said Commission was a just and reasonable schedule of rates.

(69) Your orators further show that said parties aggrieved will be greatly and irreparably injured, and that a great and irreparable loss and damage will be inflicted upon the business of said parties aggrieved.

(70) Your orators further show that notwithstanding the facts set forth in this Bill of Complaint the said Commission maintains and intends to maintain, and will unless the same is enjoined, set aside, annulled and suspended by the order of this Honorable Court, maintain the order aforesaid as an effective order.

In consideration whereof and for as much as your orators are remedless in the premises at and by the strict rules of the common law and are only relievable in a court of equity where matters of this nature are properly cognizable and relievable, your orators pray:

First. That the defendants named in the caption and in the body of the foregoing Bill of Complaint may be made parties defendant of this Bill of Complaint.

Second. That pending this action and before final disposition

thereof that the defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company, be compelled by mandatory order to keep a separate account of any and all sums of money collected by it as freight for transportation over the said road on any and all shipments of goods, wares and merchandise under said Classes 1, 2, 3, 4, 5 and 6, respectively, from said City of Cincinnati, Ohio, to said Chattanooga, Tennessee, and to hold the same subject to the further orders of this court.

65 Third. That said order of said The Interstate Commerce Commission in said case No. 1542 be suspended, set aside, annulled and declared void and of no effect.

Fourth. That said defendant, The Interstate Commerce Commission, be restrained and enjoined from enforcing said order in said case No. 1542, and that it be further restrained and enjoined from compelling said defendant, The Cincinnati, New Orleans and Texas Pacific Railway Company, from complying with said order and that said defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company, be restrained and enjoined from maintaining and collecting said 70 cent schedule of rates.

Fifth. That said defendant, The Interstate Commerce Commission, by mandatory injunction be required:

(a) To set aside and annul said order in said case No. 1542.

(b) To reopen said case No. 1542 and proceed to the determination of said case No. 1542, and when said case shall have been so reopened and when proceeding to the determination of said case, apply thereto the limitations imposed by the Constitution of the United States, particularly the limitations imposed by Article 5 to the Amendments of the Constitution of the United States; to apply thereto the provisions of the Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto, and all other statutes of the United States; to keep within the limitations of the delegation of powers to said The Interstate Commerce Commission, and not to exceed the limitations on the powers of said The Interstate Commerce Commission; to act within the delegated powers of said Commission; to act reasonably within the powers delegated to said Commission; to administer the substance of the Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto; not to act within the mere shadow of the powers delegated to said The Interstate Commerce Commission by said Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto; to give the parties aggrieved and said complainants in said case No. 1542 substantial relief, and not deny them substantial relief and not give them the mere shadow of relief; that in determining said case not to act upon mere conjecture and not to act by mere fiat; not to act for the mere convenience of said members

66 of said The Interstate Commerce Commission and the mere convenience of said The Interstate Commission; not to make the mere convenience of the Interstate Commerce Commission the measure of justice; not to act unconstitutionally, unlawfully, oppressively and unjustly; to apply to said matter in said case No. 1542 the full letter and spirit of the rules of law found by

said Commission to be sound; not to apply thereto the unsound rules of law as announced by said Commission; to apply thereto correct rules of law referred to in this Bill of Complaint and all other sound rules of law; not to act arbitrarily in reference thereto; that said Commission proceed to find what would be a just and reasonable schedule of maximum rates; that said Commission when it shall have reopened said case and proceeded to a determination of said case to avoid each and all of the objections made in this Bill of Complaint to said order of said Commission and to its findings and conclusions as contained in said report, which said report was by said Commission made part and parcel of its order in said case No. 1542, and to render to complainants in said case No. 1542 and to said parties aggrieved full justice; to determine said case according to rules of law to be announced and fixed by the court in this case.

Sixth. That this court reserve this cause pending the reopening and determination of said case No. 1542 before and by said Commission for the purpose of enabling this court to determine whether said Commission has proceeded to a determination of said case No. 1542 in accordance with the equities of this Bill of Complaint and the rules of law to be laid down by this court in this cause for the determination of said case and for such final order, judgment or decree in this cause as may be just and equitable.

Seventh. That your orators and the parties aggrieved have an accounting and such other and further relief as is or may be just and equitable and to which they may be entitled.

Eighth. That a temporary restraining order may issue, as the court may think proper in the premises enjoining and restraining the defendant as set forth in the preceding paragraphs and that a preliminary injunction may issue, and that a permanent injunction may be entered on final hearing as set forth in the preceding paragraphs of the prayer.

67-110 Ninth. That your Honors grant unto your orators a writ of subpoena of the United States of America directed to the defendants named in the caption and in the body of this Bill of Complaint, commanding them and each of them at a certain day and under a certain penalty therein to be specified, personally to be and appear before this Honorable Court and then and there a full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived) and to stand to and abide by such order and decree herein as shall seem meet and agreeable to equity and in good conscience.

And your orators will ever pray, etc.

LITTLEFORD, JAMES, FROST & FOSTER,

*Solicitors for Complainants.*

FRANCIS B. JAMES,

*Of Counsel.*

STATE OF OHIO.

*County of Hamilton, ss:*

J. Gordon Taylor, being first duly cautioned and sworn an oath, deposes and says that he is Secretary of the Eagle White Lead Company, an Ohio corporation, one of the complainants herein; that he has read the said Bill of Complaint and knows the contents thereof, and that the allegations therein contained are true.

J. GORDON TAYLOR.

Subscribed and sworn to before me this 24th day of October, 1910.

[N. P. SEAL.]

G. W. WELCH,

*Notary Public in and for Hamilton County, Ohio.*

(Exhibits A, B, &amp; C omitted in printing per stipulation.)

111 And on the same day, to wit, the 24th day of October, there was filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio, in said entitled cause, a certain motion, in the words and figures following, to wit:

*Motion to Consolidate.*

112 Circuit Court of the United States, Southern District of Ohio,  
Western Division.

#6668.

THE EAGLE WHITE LEAD COMPANY et al., etc., Complainants,  
vs.

THE INTERSTATE COMMERCE COMMISSION et al., Defendants.

*Motion to Consolidate.*

Now come the complainants and move the court to consolidate case #6641 on the docket of this court with this cause.

LITTLEFORD, JAMES, FROST AND FOSTER,

*Solicitors for Complainants.*

113 And afterwards, to wit, on the first day of December, 1910, there was filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio, in said entitled cause, a certain demurrer of the Interstate Commerce Commission to the bill of complaint, in the words and figures following, to wit:

*Demurrer of the Interstate Commerce Commission.*

114 In the Circuit Court of the United States, Southern District of Ohio, Western Division.

In Equity. No. 6668.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schraeder Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Complainants,

v.

THE INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

Demurrer of the Interstate Commerce Commission, One of the Above-named Defendants, to the Bill of Complaint of the Above-named Complainants.

*Demurrer.*

115 The Interstate Commerce Commission, one of the defendants in the above-entitled suit, by protestation, not confessing or acknowledging any of the matters or things in the bill of complaint of the above-named complainants contained to be true in such manner and form as therein set forth and alleged, demurs to said bill. And for cause of demurrer shows—

I.

That said complainants have not, in and by their said bill, shown any equity existing in them or in any of them.

II.

That said complainants have not, in and by said bill, shown that they are, or that any of them is, entitled to the relief or any of the relief prayed for by them in and by said bill.

III.

That said complainants have not, in and by said bill, shown that the legislative department of the Government of the United States is or ever has been without power to grant the authority exercised by this defendant in making the order dated February 17, 1910, set forth in said complainants' said bill.

IV.

That said complainants have not, in and by said bill, shown that said legislative department did not duly confer upon this defendant the authority exercised by this defendant in making said order.

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## V.

That said complainants have not, in and by said bill, shown that the subject-matter of said order is not within the jurisdiction conferred upon this defendant by said legislative department.

## VI.

That said complainants have not, in and by said bill, shown that in making said order this defendant exercised authority in excess of the authority conferred upon it by said legislative department.

## VII.

That said complainants have not, in and by said bill, shown that in making said order this defendant exercised unlawfully the authority or any of the authority conferred upon it by said legislative department.

## VIII.

That said complainants have not, in and by said bill, shown that in making said order this defendant violated any constitutional or other right of said complainants or any of said complainants, over which this court has or may exercise jurisdiction.

Wherefore and for divers other good causes of demurrer appearing in and by said bill this defendant demurs thereto and prays the judgment of this honorable court whether defendant shall be  
117 compelled to make any answer to the said bill or any part thereof.

INTERSTATE COMMERCE COMMISSION,  
By P. J. FARRELL, *Its Solicitor*,  
SHERMAN T. McPHERSON,  
*United States Attorney, Cincinnati, Ohio;*  
P. J. FARRELL,  
*Special Assistant United States At-*  
*torney, Washington, D. C.,*  
*Solicitors for Interstate Commerce Commission.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

P. J. FARRELL,  
*Solicitor for Defendant, Interstate Commerce Commission.*

118 WASHINGTON,  
*District of Columbia, ss:*

P. J. Farrell, being first duly sworn, says on oath that he is the solicitor of the Interstate Commerce Commission, one of the defendants in the above-entitled suit, and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this 28th day of November, 1910.

[NOTARIAL SEAL.]

H. S. MILSTEAD,  
*Notary Public.*

119 And afterwards, to wit, on the 5th day of January, 1911, there was filed in the clerk's office of the United States Circuit Court for the Western Division of the Southern District of Ohio, in said entitled cause, a certain demurrer of the Cincinnati, New Orleans and Texas Pacific Railway Company to the bill of complaint, in the words and figures following, to wit:

*Demurrer of the Cincinnati, New Orleans & Texas Pacific Railway Company.*

120 Circuit Court of the United States, Southern District of Ohio, Western Division.

No. 6668.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Complainants,

VS.

THE INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

The Demurrer of The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation, to the Bill of Complaint of The Eagle White Lead Company, an Ohio Corporation; The Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth.

This defendant by protestation, not confessing or acknowledging any or all of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, and reserving to itself all benefit and manner of advantage by reason of the manifold imperfections and inconsistencies of the said bill of complaint

121 and of the irrelevant and immaterial matter therein contained, demurs to the said bill, and for cause of demurrer shows that the complainants have not in and by said bill made or stated such a cause as entitled them in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any of such matters.

And for further and additional ground of demurrer this defendant assigns and says that this court has no jurisdiction of the subject-matter of the above cause.



Wherefore this defendant demurs to the said bill and to all matters and things therein contained, and prays the judgment of this court whether it shall be compelled to make any farther or other answer thereto, and prays to be dismissed with its reasonable costs on this behalf sustained.

HARMON, COLSTON,  
GOLDSMITH & HOADLY,  
*Solicitors for Defendant The Cincinnati,  
New Orleans & Texas Pacific Railway  
Company.*

I certify that in my belief the foregoing demurrer of The Cincinnati, New Orleans & Texas Pacific Railway Company to the bill of complaint of The Eagle White Lead Company, The Peters Cartridge Company, The Charles Boldt Company, The Overman and Schrader Cordage Company, and Henry Ratterman and Theodore Luth, partners doing business as Ratterman and Luth, is well founded in law and proper to be filed in the above case.

GEO. HOADLY,  
*Of Counsel for The Cincinnati, New Orleans  
& Texas Pacific Railway Company, De-  
fendant.*

UNITED STATES OF AMERICA,  
*Southern District of Ohio,  
State of Ohio, Hamilton County, ss:*

Thomas C. Powell, being first duly sworn on oath says that he is the Vice-President of The Cincinnati, New Orleans & Texas Pacific Railway Company; that he has read the foregoing demurrer to the bill of complaint of The Eagle White Lead Company and others, in this suit, and that the same is not interposed for purposes of delaying said suit or other proceedings therein.

T. C. POWELL.

Sworn to before me and subscribed in my presence, this 5th day of January, A. D. 1911.

[NOTARIAL SEAL.]

EUGENE BRUNSMAN,  
*Notary Public, Hamilton County, Ohio.*

123 And afterwards, to wit, on the 15th day of February, 1911, said cause having been transferred to the United States Commerce Court in accordance with Section 6 of the Act of Congress approved June 18, 1910, the originals of all papers, and a certified transcript of all record entries in the case or proceeding up to the time of transfer, were filed in the United States Commerce Court.

124 And on the same day, to wit, the 15th day of February, 1911, there was filed and entered in the clerk's office of the

United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Consolidating Nos. 5 and 6.*

125 In the United States Commerce Court.

No. 6.

THE EAGLE WHITE LEAD COMPANY et al., Petitioners,  
vs.  
INTERSTATE COMMERCE COMMISSION et al., Respondents

On motion of solicitors for petitioners it is ordered: That this cause be consolidated with cause No. 5 on this docket.

MARTIN A. KNAPP,  
*Presiding Judge.*

126 And afterwards, to wit, on the 3d day of April, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Granting United States Leave to Intervene.*

127 In the United States Commerce Court.

No. 5.

JAMES J. HOOKER et al., Petitioners,  
vs.  
MARTIN A. KNAPP et al., Respondents.

No. 6.

EAGLE WHITE LEAD CO. et al., Petitioners,  
vs.  
INTERSTATE COMMERCE COMMISSION et al., Respondents.

In this cause the United States moves the Court that it be permitted to intervene and to become a party defendant; and it appearing to the Court that the cause involves public interests, the motion is allowed, and the United States is made a party defendant accordingly, and it is granted thirty days within which to make defense, either by motion or answer, but defense shall be made in such time as not to delay a hearing of the cause.

MARTIN A. KNAPP,  
*Presiding Judge.*

128 And afterwards, to wit, on the 2d day of May, 1911, there was filed in the clerk's office of the United States Commerce

Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

*Motion of the United States to Dismiss the Petitions.*

129

In the United States Commerce Court.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively President and Secretary of the Receivers and Shippers Association of Cincinnati, Ohio, Petitioners,

v.

MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, and The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, New Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Defendants.

Consolidated.

*Motion of the United States to Dismiss the Petitions.*

The Attorney General of the United States of America, in behalf of the United States, Intervener, moves the Court to dismiss the petitions upon the following grounds, viz:

130 (1) It appears from the petitions and each of them, and the exhibits referred to therein and attached thereto, that the same are not prepared in accordance with the statute in such case made and provided, in that they do not set forth briefly and succinctly the facts constituting the petitioners' causes of action and specifying the relief sought.

(2) For that the said petitioners have not in and by their said petitions set forth any cause of action existing in them or any of them; and have not in and by their said petitions shown that they are, or any of them is, entitled to the relief prayed for, or any part of the same.

(3) Neither of the said petitions and the exhibits referred to therein and attached thereto states any cause of action, for that when the said petitioners invoked the action of the Interstate Commerce Commission to hear and determine their complaint, the Commission in hearing and determining the same, and in entering its order thereon, acted within the power conferred upon it by the statute in such case made and provided, and the petitions here filed with the exhibits attached set forth no sufficient basis to justify a disturbance of that order.

(4) It appears from the said petitions and the exhibits referred to therein and attached thereto that the petitioners seek here the same relief which they sought from and were denied by the Interstate Commerce Commission, when this Court has no jurisdiction or power to act for and instead of the said Commission, or to make orders and to establish rules regulating the conduct and business of common carriers subject to the Act to Regulate Commerce.

(5) This Court hath no jurisdiction to entertain the said petitions or either of them for that this Court hath no power to grant, at the instance of the petitioners, the prayers of the said petitions that the Court set aside and annul the order of the Interstate Commerce Commission in case No. 1542, or to reopen said case No. 131 1542, and proceed to the further determination thereof, or to act in any other of the matters and things for which relief is prayed.

(6) It appears from the said petitions and the exhibits referred to therein and attached thereto that the said petitioners have not shown that in making its said order the Interstate Commerce Commission violated any right of the petitioners, or any of them, protected by the Constitution of the United States, or of any other right of the said petitioners, or any of them, over which this Court may exercise jurisdiction.

(7) It appears from the said petitions and the exhibits referred to therein and attached thereto that the said petitioners have not shown that in making its said order the Interstate Commerce Commission exceeded any power or authority conferred upon it by the Act to Regulate Commerce.

(8) It appears from the said petitions and the exhibits referred to therein and attached thereto that this Court is without jurisdiction to entertain the subject matter thereof.

(9) That the said petitions are, and each of them is, in other respects, to be pointed out upon the hearing of this motion, too vague, indefinite, irregular and insufficient to entitle the petitioners to the relief prayed, or any part of the same.

Wherefore, The Intervener prays that its motion be sustained and that the petitions be dismissed at the petitioners' cost; and for such other and further action as may be appropriate.

GEO. W. WICKERSHAM,

*Attorney-General of the United States.*

132 And on the 19th day of May, 1911, being one of the days of the May session of the United States Commerce Court,

1911, in the proceedings thereof in said entitled cause consolidated with No. 6, before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

*Hearing on Demurrers and Motion to Dismiss.*

Said causes came on for hearing before the court on the demurrer of the Interstate Commerce Commission, the demurrer of the Cincinnati, New Orleans & Texas Pacific Railway Company, and the motion of the United States to dismiss; R. Walton Moore, Esquire, and Frank W. Gwathmey, Esquire, appearing in behalf of the Cincinnati, New Orleans & Texas Pacific Railway Company, respondent, and Francis B. James, Esquire, in behalf of the petitioners. Thereupon said causes were continued for further hearing on Monday, May 22, 1911.

133 And on the 22d day of May, 1911, being one of the days of the May session of the United States Commerce Court, 1911, in the proceedings thereof in said entitled cause consolidated with No. 6, before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

*Cause Taken Under Advisement.*

Said causes came on to be further heard on the demurrers of the Interstate Commerce Commission and the Cincinnati, New Orleans & Texas Pacific Railway Company and on the motion of the United States to dismiss the petitions; P. J. Farrell, Esq., appearing on behalf of the Interstate Commerce Commission, Francis B. James, Esq., on behalf of the petitioners and R. Walton Moore, Esq., on behalf of the respondent, The Cincinnati, New Orleans & Texas Pacific Railway Company. Thereupon the causes were taken under advisement by the court.

134 And afterwards, to wit, on the 26th day of July, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain motion, in the words and figures following, to wit:

*Motion to Amend Bill.*

135 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

*Motion to Amend Bill.*

Now come the petitioners by Littleford, James, Frost & Foster, their solicitors, and Francis B. James of counsel, and reduce to writing their motion made in open court on May 19, 1911, to amend the original bill of complaint herein in this cause by inserting in paragraph 1 thereof the words "as to each complainant" after the word "costs."

FRANCIS B. JAMES,  
*Of Counsel for Petitioners.*

LITTLEFORD, JAMES, FROST &amp; FOSTER.

#1002-3-4-5 *First National Bank Building,*  
*Cincinnati, Ohio, Solicitors.*

136 And on the same day, to wit, the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Permitting Amendment to Bill.*

137 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America. Respondents.

*Order Permitting Amendment to Bill.*

This cause came on to be heard upon motion of petitioners through their counsel and solicitors to amend the original bill of complaint paragraph 1 by inserting the words "as to each complainant" after the word "costs," the court having considered the same and being of the opinion that petitioners have a right to so amend under Rule 29 In Equity, does hereby order and decree that petitioners be permitted to so amend their bill and said words are to be treated as inserted in the bill of complaint.

By the Court:

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,  
*Presiding Judge of the United  
States Commerce Court.*

138 And on the same day, to wit, the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain opinion and dissenting opinion, in the words and figures following, to wit:

*Opinion and Dissenting Opinion.*

139 United States Commerce Court, May Session, 1911.

No. 6.

THE EAGLE WHITE LEAD Co. et al., Petitioners,  
v.THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW  
Orleans & Texas Pacific Railway Co., and The United States,  
Respondents.

Francis B. James for petitioner.

R. Walton Moore and Frank W. Gwathmey for Cincinnati, New  
Orleans & Texas Pacific Railway Co.J. A. Fowler, Assistant Attorney General, Blackburn Esterline,  
Special Assistant Attorney General, for the United States.

P. J. Farrell for Interstate Commerce Commission.

[July 20, 1911.]

CARLAND, *Judge*:

The bill in this case is, for all practical purposes, the same as the bill in case No. 5, Receivers and Shippers' Association of Cincinnati v. Interstate Commerce Commission and the Cincinnati, New Orleans & Texas Pacific Railway Co., and was filed for the same purpose. The cases were submitted together upon bill and demurrer.

For the reasons stated in the opinion filed in case No. 5, the demurrer in this case must be sustained and the bill dismissed.

Archbald and Mack, Judges, dissenting.

140 The opinion and dissenting opinion filed in Cause No. 5  
are in the words and figures following, to-wit:



*Opinion and Dissenting Opinion in Cause No. 5.*

United States Commerce Court, May Session, 1911.

No. 5.

JAMES J. HOOKER and EZRA E. WILLIAMSON, Respectively, President and Secretary of the Receivers and Shippers' Association, of Cincinnati, Ohio, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Co., and the United States, Respondents.

Francis B. James for petitioner.

R. Walton Moore, Frank W. Gwathmey, for Cincinnati, New Orleans & Texas Pacific Railway Co.

J. A. Fowler, Assistant Attorney General; Blackburn, Esterline, Special Assistant Attorney General, for the United States.

P. J. Farrell for Interstate Commerce Commission.

[July 20, 1911.]

CARLAND, *Judge*:

In this opinion, for the sake of brevity, the Cincinnati, New Orleans & Texas Pacific Railway Co. will be abbreviated C. N. O. & T. P.; The Interstate Commerce Commission will be abbreviated Commission; the Louisville & Nashville Railway Co. will be abbreviated L. & N.; and the Nashville, Chattanooga & St. Louis Railway Co. will be abbreviated N., C. & St. L.

Petitioners are firms, partnerships, and corporations engaged in various kinds of mercantile, commercial, industrial, and manufacturing pursuits in Hamilton County, Ohio, and manufacture and produce goods, wares, and merchandise, and sell annually large quantities thereof of great value, alleged in the bill to be several hundred thousand dollars, to purchasers located at Chattanooga, Tenn., which said goods, wares, and merchandise are enumerated in the freight tariffs and classifications governing the same of the respondent, C. N. O. & T. P. Said petitioners have invested in building up and maintaining their respective lines of business an amount exceeding the sum of \$25,000,000.

The C. N. O. & T. P. is a corporation duly organized under the laws of the State of Ohio and is a common carrier engaged in the transportation of goods, wares, and merchandise by railroad from the city of Cincinnati, Ohio, to the city of Chattanooga, Tenn., the northern terminus of said C. N. O. & T. P. being at Cincinnati and the southern at Chattanooga.

On the 14th day of July, 1910, petitioners filed their bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, Western Division, for the purpose of obtaining a judgment of that court setting aside and annulling an order of the

Commission dated February 17, 1910, but in fact rendered May 24, 1910, and which order is in the following language:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present rates of defendant the Cincinnati, New Orleans & Texas Pacific Railway Co. (lessee of the Cincinnati Southern Railway) for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., are, to the extent that said rates exceed the rates named in paragraph 3 hereof, unjust and unreasonable.

"2. It is ordered, That said defendant be, and it is hereby, notified and required to cease and desist, on or before the 15th day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting its present rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn.

"3. It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., which shall not exceed the following, in cents per 100 pounds, to wit:

Class .....	1	2	3	4	5	6
Rate .....	<u>70</u>	<u>60</u>	<u>53</u>	<u>44</u>	<u>38</u>	<u>29"</u>

The C., N. O. & T. P. and the Commission filed demurrers to the bill. Subsequently the case was transferred to this court under the provisions of section 6 of the act to create a Commerce Court and to amend the act entitled "An act to regulate commerce," and the cause has now been submitted for decision upon the bill and demurrers.

The bill of complaint is quite voluminous, consisting, exclusive of exhibits, of 66 printed pages. The material allegations, however, which in our judgment are necessary to be considered in order to dispose of the case may be stated briefly as follows:

In 1894 the Commission decided the cases of Cincinnati Freight Bureau v. C., N. O. & T. P., and Chicago Freight Bureau v. I. & N., et al. (6 I. C. C. Rep., 195). These proceedings had been instituted by the commercial interests of Cincinnati and Chicago for the purpose of correcting an alleged discrimination in rates upon the numbered classes from points of origin in the Central West as compared with rates from points of origin in the East, to southern territory. The complaint of the Chicago Freight Bureau alleged

143 that the rates for the transportation of freight from western to southern points upon the numbered classes from Cincinnati and other Ohio River crossings to southern points of destination were excessive, and that the rates from Chicago were even more excessive. Under this allegation the Commission held that it might inquire into the inherent reasonableness of these rates, and proceeded to dispose of the case upon that ground. The Commission held that the rates from Cincinnati were too high and should be materially reduced. The following are the rates then in effect from Cincinnati to Chattanooga and those ordered by the Commission, showing the reductions made:

Classes .....	1	2	3	4	5	6
Rates in effect.....	76	65	57	47	40	30
Reduced rates .....	60	54	40	30	24	22
Reductions .....	16	11	17	17	16	8

The order of the Commission, made in pursuance of this decision, was not complied with by the carriers, and the Commission thereupon instituted proceedings in the Circuit Court for the Southern District of Ohio to enforce obedience to its requirements. Such proceedings were had in that suit that the Supreme Court of the United States finally directed a dismissal of the bill of complaint upon the ground that the act to regulate commerce as it then stood conferred no authority upon the Commission to establish a rate for the future; that this order was in effect the fixing of a future rates and therefore without warrant of law, and void. (*I. C. C. v. C., N. O. & T. P.*, 167 U. S., 479.)

When the interstate commerce law was amended in 1906 by giving to the Commission power to fix and establish a rate for the future, the Receivers & Shippers Association of Cincinnati commenced proceedings before the Commission and against the C., N. O. & T. P. and the Southern Railway Co. for the purpose of obtaining the benefit of the holding of the Commission in the former case. As a result of a hearing had by the Commission in the proceedings last mentioned, the order complained of in this action was made.

It is claimed by the petitioners that the maximum rate fixed by said order is much too high and is extortionate, so much so that the Commission in making the order violated the fifth amendment to the Constitution of the United States, which prohibits the taking of private property without due process of law or without just compensation. While said order of the Commission was in full force and unsuspended in any way, the C., N. O. & T. P. put into effect a schedule of rates for the transportation of freight between Cincinnati, Ohio, and Chattanooga, Tenn., in accordance with the maximum fixed by the Commission, and said rates are still in force.

In the report of the Commission, which is made a part of said order, it is found as follows:

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction,

cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."

This language of the report refers to the finding made by the Commission in 1894, and the reductions made then by the Commission appear in the table heretofore mentioned in this opinion.

144 The bill in this case also alleges that if the schedule of rates fixed by the Commission in 1894 had been in force or had been applied during the years 1903 to 1908, both inclusive, the yearly average net profit of the C., N. O. & T. P. would have been 40.66 per cent. It also appears from the bill of complaint that the city of Cincinnati owns the line of railroad between the city of Cincinnati, Ohio, and the city of Chattanooga, Tenn., which is commonly known as the Cincinnati Southern, and now and during the times mentioned in the bill operated by the C., N. O. & T. P. The road originally cost the city of Cincinnati \$18,000,000, and the city subsequently spent for terminal facilities \$2,500,000, making a total cost of the Cincinnati Southern to the city of Cincinnati of \$20,500,000. The C., N. O. & T. P. leased this property, and is still leasing it, and the basis of rental returned to the city of Cincinnati prior to 1906 was 6 per cent, and 5 per cent subsequent to that date. The C., N. O. & T. P. owns its own equipment and never did have any interest in the Cincinnati Southern beyond the right to use the property under the terms of the leasehold. The capital stock of the C., N. O. & T. P. for the years 1903 to 1908, both inclusive, was \$5,000,000, divided into \$3,000,000 of common stock and \$2,000,000 of preferred stock, and about the year 1908 it increased its capital stock by adding \$500,000 of preferred stock, making its entire issued capital stock for 1908 \$5,500,000. The value of the property of the C., N. O. & T. P. between the years 1903 and 1908, both inclusive, was \$5,000,000, and after 1908 was \$5,500,000, and was all the property of the C., N. O. & T. P. devoted to and employed in the public service and use and for the public convenience.

The C., N. O. & T. P. is a single-track railroad from Cincinnati to Chattanooga, a distance of 336 miles, without branches, and has an average gross earning per mile of \$26,082.63. The L. & N. runs from Cincinnati to Louisville, and from Louisville to Nashville, the distance from Cincinnati to Louisville being 114 miles and the distance from Louisville to Nashville being 185.9 miles. The distance from Cincinnati to Nashville via the L. & N. is thus shown to be 299.9 miles. Nashville is connected with Chattanooga by the N., C. & St. L., the distance from Nashville to Chattanooga being 151 miles, making the distance from Cincinnati to Chattanooga, via the L. & N. from Cincinnati to Louisville and Louisville to Nashville, and from Nashville to Chattanooga over the N., C. & St. L., 450.9 miles. The direct haul from Cincinnati to Chattanooga via the C., N. O. & T. P. is thus 114.9 miles shorter than the indirect haul via the L. & N. and the N., C. & St. L. by way of Louisville and Nashville. The average gross earnings, per mile, between Cincin-

nati and Chattanooga via the L. & N. and the N., C. & St. L. is \$25.593.40.

In view of the finding of the Commission heretofore mentioned, it necessarily follows that its order ought to have followed its findings, unless the reasons stated by the Commission for not doing so are valid. In this connection it must be remembered, however, that the power to establish reasonable and just rates for the future for the transportation of freight by common carriers is vested by law in the Commission and no part thereof is vested in this Court, and this Court may not disturb the order complained of unless it can be clearly found that it conflicts with the provisions of the fifth amendment to the Constitution of the United States, providing the power conferred has been regularly exercised. The order of the Commission itself does not fix a schedule of rates to be put in effect by the C., N. O. & T. P., but simply fixes a maximum rate beyond which the railroad may not go. The railroad, however, upon the making of this order established the schedule of rates as high as the order would permit, and therefore it may be truly said that the schedule of rates put in effect by the railway company is the schedule of rates made by the Commission or at least authorized by it. All that this Court could do if it found the maximum schedule fixed by the Commission violated the constitutional rights of shippers over the C., N. O. & T. P. would be to set aside the order; but as the rates prescribed thereby have already gone into effect, and as this Court has no authority or power to establish rates or to order that any particular rate be put in effect, it necessarily results that the rates now in effect on the C., N. O. & T. P. would continue in effect unless changed by the carrier or the Commission. The carrier could change its rates if the order was set aside and even make them higher than they are now. The Commission could again investigate the matter and fix a new schedule of rates. So that it appears that all the shippers would gain in this litigation would be the vacation of the order, and if the court held that the rates permitted were so high as to be violative in a constitutional sense of the rights of the shippers then no doubt the Commission would not again establish such a high schedule of rates. But in any event if we should set aside the order on constitutional grounds the shippers would be obliged to go again to the Commission for relief. At first we were inclined to think that the result which would be obtained by a successful termination of this suit in behalf of the shippers would be so inconsequential as to render it unnecessary for this Court to take jurisdiction over the case, but upon further reflection it would seem that the shippers have the right to a judgment of this court as to whether or not the schedule of rates contained in the order complained of is so high as to be violative of the fifth amendment to the Constitution as to the difference between what the Commission found would be reasonable if they considered the C., N. O. & T. P. by itself and the maximum rates that were fixed. Then if the shippers again went before the Commission they would have the benefit of the judgment of this court upon that subject. And in that view we proceed to consider

the question as to whether the reasons given by the Commission for not reducing the schedule of rates for the classes mentioned to the sums which the Commission found would be reasonable if the C., N. O. & T. P. should be considered by itself are valid.

It is claimed by the petitioners that the Commission, having found that the so-called 60-cent schedule would be reasonable for the C., N. O. & T. P. considered by itself, was bound to establish such schedule as the result of its finding, and that the Commission's establishing a higher schedule for the reasons mentioned in its report, while seemingly within its power to fix a reasonable rate, was really and in fact beyond its power, as the Commission had no right to take into consideration in fixing a higher schedule the matters which induced it to make the order which it did.

There are two questions which are presented to this court for decision: First. Are the reasons given by the Commission for the establishment of the schedule mentioned in the order valid, 146 or are they so outside and beyond the power of the Commission to fix a reasonable rate as to come within the rule that prohibits the Commission from fixing a rate for reasons which the Commission is not authorized to consider? (*Southern Pacific Co. v. I. C. C.*, 219 U. S., 433.) Second. Is it shown, beyond reasonable question, by the present record that the schedule of rates contained in the order of the Commission complained of clearly violates the fifth amendment to the Constitution of the United States by taking the property of petitioners without due process of law or without just compensation if the taking is for a public purpose?

It seems to have been decided in the case of *Board of Railroad Commissioners of the State of Kansas v. Symms Grocery Co. et al.*, 35 Pac., 217, that the shipper can not invoke these constitutional provisions for the reason that he is not obliged to ship; that he may utilize the rate prescribed or he may not. We are not impressed with the soundness of this decision. The logical result of such a holding as applied to the facts in the present case would be equivalent to saying to the shipper, "You may pay an unconstitutional rate or go out of business;" and we do not think that the protection of the Constitution is held on any such condition.

In stating the reasons which in the judgment of the Commission compelled it to take into account in fixing the schedule of rates which it did other considerations and other railroads than the C., N. O. & T. P., we can do no better than to quote from the report of the Commission, as follows:

"The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Co., but also with reference to other companies whose rates are necessarily affected by these; otherwise stated, the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company, just as it would be the misfortune of some other company if it could not show as favorable earnings.

"The rate from Cincinnati and Louisville to Chattanooga has been the same for the last 28 years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future. Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati.

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reductions to Chattanooga. Originally, the same rate had

147 been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis & San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the east as was the case in 1905.



"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory. How far are we at liberty to consider all this in fixing a reasonable rate over the Cincinnati, New Orleans & Texas Pacific? It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points.

"Some indignation was expressed by several witnesses upon the part of the city of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad that property was not more devoted to the interests of the city of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present, it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have

148 benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities, and the relation of rates would have continued the same. However this may be, the city has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital.

"In the Matter of Proposed Advances in Freight Rates (9 I. C. C. Rep., 382) the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the Spokane case (15 I. C. C. Rep., 376) the same subject was considered and the same conclusion reached. The last affirmance of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.* (15 I. C. C. Rep., 555), in which the rule is stated by Clark, Commissioner, as follows:

"In the Spokane case (15 I. C. C. Rep., 376) we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

"As before suggested, we can not, in determining competitive rates, select that railroad which is the shortest or most advantageously situated and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by 'reasonably direct lines.'



"We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits.

"The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville & Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile. Now, in adjusting the rates of the Louisville & Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section of the road by itself, or shall it establish a common rate for the whole?

"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line, for the branch-line business when it reaches the main line is surplus traffic, from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates upon the  
149 Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907 over two-thirds of the tonnage was delivered to it by its connections and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railroad but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profits of to-day might not be a deficit.

"The complainants urge that the Cincinnati Southern is really a part of the Southern Railway system. If it were so considered the gross earnings per mile of the entire system would be less than those of either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis.

"If these rates are to be established with reference to other rates in the vicinity it becomes pertinent to inquire how the present rates compare with other rates for similar distances in the South. Extensive tables have been furnished by the defendants instituting such comparisons, and these tables have been to some extent criticized and replied to by the complainants.

"It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the railroad commissions of most States in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances.

"The complainants call our attention to rates from Cincinnati to Nashville. The distance is 300 miles and the rates are materially lower than those from Cincinnati to Chattanooga, being, first class, 53 cents as against 76 cents, and sixth class, 23 cents as against 30 cents. But this Commission has found (*Chamber of Commerce of Chattanooga v. Southern Ry. Co.*, 10 I. C. C. Rep., 111), and the Federal courts have found (*East Tenn., Va. & Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1.), that water competition influences these rates to Nashville. The rate from Cincinnati to an intermediate point where there is no water competition is higher in proportion to distance than those to Chattanooga. Thus the first-class rate from Cincinnati to Gallatin, 20 miles north of Nashville, is 78 cents.

"The complainant also refers to rates from Virginia cities to Atlanta which are less per ton-mile than those in question. But it is well understood that these rates are materially affected by water competition, and ordinarily the long-distance rate would be less per ton-mile than the rate for the shorter distance. If rates from Virginia cities south for distances of from 300 to 350 miles are examined, it will be found that they usually equal or exceed the Chattanooga rates.

"The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for lower rates; and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past railways  
150 have been able to introduce economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight 1 mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices.

"We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive."

It appears from the findings of the Commission that it has always refused in the consideration of the reasonableness of a rate or rates to consider only the particular carrier making the same by itself, but on the contrary has always considered the rates in a particular territory or the rates of other carriers to be affected by the change of the particular rate or rates in question; and we think it fair to say that so far as the Commission is concerned there has been a uniform policy, public policy if you please, because the Commission represents the United States in so far as it acts within the scope of its delegated authority in the establishment of reasonable and just rates, to the effect that it will not fix rates or determine their reasonableness solely upon a consideration of the particular carrier whose rates are directly involved. We think this court may take judicial knowledge of the

fact that the interstate rates prescribed for the transportation of freight by common carrier must necessarily be more or less interdependent, or at least be so related to each other that the rate-making power will not simply because it has the power fix a rate upon a single line of railroads which will necessarily disorganize established and reasonable rates on other railroads in the same territory. All rates established in accordance with law are presumed to be just and reasonable. It is for this reason that the rates for the transportation of freight of other carriers in the same territory may be looked into as evidence of what should be a just and reasonable rate, providing conditions are similar. We can not as a court not vested with the power to fix rates say, beyond question, that the elements which the Commission took into consideration in fixing the schedule complained of were improper for the Commission to consider, and therefore can not conclude that the Commission based a schedule of rates upon improper grounds.

It was said by the Supreme Court in *Texas & Pacific Railway v. I. C. C.*, 162 U. S., 233.

"that the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations; that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers \* \* \*."

Under the second proposition we can not disturb the order of the Commission on the theory that it fixed rates so high as to be violative of the fifth amendment to the Constitution, unless it shall clearly appear to us that the constitutional rights of the shippers were invaded thereby. The fixing of the schedule of rates complained of was a legislative act.

*Munn v. Illinois*, 94 U. S., 113.

*Peil v. Chicago N. W. Ry. Co.*, 94 U. S., 161.

*Express Cases*, 117 U. S., 1.

*C. M., etc., Ry. v. Minnesota*, 124 U. S., 418.

*Reagan v. Farmers' Loan & T. Co.*, 154 U. S., 362.

*St. L. & S. F. Ry. Co. v. Gill*, 156 U. S., 649.

*C., N. O. & T. P. Ry. Co. v. I. C. C.*, 162 U. S., 184.

*T. & P. Ry. v. I. C. C.*, 162 U. S., 197.

*I. C. C. v. Cincinnati Ry. Co.*, 167 U. S., 479.

*Railroad Commission Cases*, 116 U. S., 307.

*Smyth v. Ames*, 169 U. S., 515.

*Chord v. L. & N. R. R. Co.*, 183 U. S., 183.

*Alpers v. City of San Francisco*, 32 Fed., 503.

*So. Pac. Co. v. R. R. Commissioners*, 78 Fed., 236.

*New Orleans Water Works Co. v. New Orleans*, 164 U. S., 471.

*Atlantic Coast Line v. North Carolina Corporation Com.*, 206 U. S., 1.

And while we are of the opinion that our power to review the order of the Commission fixing a schedule of rates is coextensive with the limits of the protecting shield of the Constitution, still it must clearly appear that such protection in some degree has been taken away. The Commission found that the rates complained of were not clearly excessive. Much less are we able to find that the rates authorized by the Commission in the order complained of and which were a reduction of the former rates are clearly excessive. In making this statement we are fully aware of the allegation of the bill as to the net earnings of the C., N. O. & T. P., and the whole case as to the excessive feature of the rates fixed by the Commission is almost entirely based upon the earnings of the C., N. O. & T. P. While earnings may be considered in the fixing of a reasonable rate to be charged by a carrier for the transportation of freight, rates necessarily can not be based upon earnings alone. This is made clearly to appear when we consider that a just and reasonable rate is one which is just to the carrier and to the shipper. It is a rate which yields to the carrier a fair return upon the value of the property employed in the public service, and it is a rate which is fair to the shipper for the service rendered; and when this rate is established if it results in large profits to the carrier the carrier is fortunate in its business, and if it results in a loss of earning power so that the business of the carrier is unprofitable the carrier is unfortunate. But the rate may not be lowered or raised merely upon the ground that the carrier is either making or losing money, providing always the rate is a reasonable and just rate. Indeed, it has been held that the earning power of the rate is one of the least considerations in fixing a just and reasonable rate.

Canada Northern R. R. Co. v. International Bridge Co.,  
L. R. 8 App. Cases, 723.

Board of Railroad Comm. v. I. C. R. R. Co., 20 I. C. C.  
Rep., 181.

Being satisfied that the Commission did not err in taking into consideration the grounds they did in fixing their schedule of rates, and not being clearly satisfied that the rates themselves are so high as to violate the constitutional rights of the shippers, we are of the opinion that the bill must be dismissed.

And it is so ordered.

152     ARCHBALD, *Judge*, dissenting:

There can be no serious question as to the conclusion which would have been reached by the Commission had they confined themselves to the determination of what was a just and reasonable rate from Cincinnati to Chattanooga by the Cincinnati Southern, without regard to the effect upon other roads. This was gone into at length in 1894, and the 60-cent schedule, which is now contended for, sustained. (*Freight Bureau v. Cin., N. O. & T. P. R. R.*, 6 Inter. Com. Com. Rep., 195.) But as the law then stood there was no authority in the Commission to fix future rates, and its action was therefore held of no effect. (*Inter. Com. Com. v. Cin., N. O. & T. P. R. R.*, 167 U. S.,

479.) But even with the lapse of time and the change of conditions, the issue as is recognized by the Commission is the same, and the same conclusion would confessedly have been reached except as they were influenced by a regard for the necessities of other roads. "If it is our duty," says Commissioner Prouty in the report, "to take this railroad by itself and to determine the reasonableness of these rates, by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case, and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission." Unfortunately, however, for the complainants this view did not prevail. It was contended by the railroad company that the rates should be fixed not only with reference to the final results to itself and its own financial necessities, but also with reference to other companies whose rates were necessarily affected thereby; or, in other words, that the Commission should establish rates which would be just and reasonable for the whole section of territory in issue, and that if a particular carrier was so situated that it could make a handsome profit it was to be recognized as a piece of good fortune with which the Commission was not to interfere. Adopting this view, which had also been followed in other cases (in re proposed advance in freight rates, 9 Inter. Com. Com. Rep., 382; *Spokane v. North Pac. R. R.*, 15 Inter. Com. Com. Rep., 376; *Kindel v. New York, New Haven & Hartford R. R.*, 15 Inter. Com. Com. Rep., 555), it was accordingly held that the reasonableness of the rate between points served by two or more lines could not be determined by reference to that line alone which was shortest and most favorably situated with respect to operation and earnings, and the rate limited thereby; but that the entire situation was to be considered, and a rate fixed which would be reasonable with respect to all the lines directly serving the points involved. That rates for similar distances on other lines similarly conditioned may be referred to, to assist in determining what is fair and reasonable in any case is clear. And it is no doubt proper also to take into account the effect on rates upon freight moving to and from other points beyond those immediately in view. But that, in my judgment, is as far as it is permitted to go. There is no right, as I look at it, to consider the effect of the rate or rates to be established on those of other roads, between the same points, or to maintain such rates at a figure which is necessary to meet the needs of those roads. And so far as the order of the Commission was induced by any such idea, it can not be sustained.

153 If the Cincinnati Southern was the only line from Cincinnati to Chattanooga the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. And if it was a line that was costly to build, or that could not be economically run, this would operate to increase the rates, and the shipper would have to pay, to correspond. But, on the other hand, if the reverse of this was true, and the road was neither an expensive one to construct, maintain, or run, the shipper would clearly be entitled to the benefit of these conditions and to the lower rates necessarily to ensue. So, also, if this favored road was the first in

the field, and other roads had come in after it was built, it certainly would not be contended that with the introduction of new and additional facilities the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well placed. It is not to be thought of that the construction of a second or third road should be made the basis for higher rates. The standard would be that of the original and most favored line. But what difference does it make whether the road which can afford the best rate is the first or the last to be built? It is the condition at the time the rate is fixed that controls. The shipper is entitled to the benefit of any advance in transportation facilities that may be made and is not to be tied down to the unprogressive and outdistanced past. The supposed advantage in competing lines between the same points becomes a detriment if rates are to be kept up to help the weakest road.

The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build, and the cost of operation and maintenance is high. But its net earnings are nevertheless large, amounting to some 44 per cent on the capital stock. The route between the same points by way of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis roads is a third longer, or 450 miles, and both of these roads have more or less unremunerative branch lines. And yet the Commission have not only put the two routes on an equality, but have even considered the influence of unprofitable branches, which have to be taken care of, fixing a rate which shall be fair for the whole system, and not simply for the immediate section of road which is involved. This, in my judgment, they had no right to do. The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just, by the consideration of what some other road, not so favorably situated, may need.

The order of the Commission, being based upon mistaken and erroneous grounds, is therefore invalid and should be so declared. (*Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S., 297; *Inter. Com. Com. v. Stickney*, 215 U. S., 98; *Southern Pacific Railway v. Inter. Com. Com.*, 219 U. S., 833.) And the case should be thereupon remanded to the Commission in order that a rate may be fixed which shall be just and reasonable as respects the respondent carrier, by whom the services are to be performed. This  
 154 does not take from the Commission the right to say what that rate shall be. Much less does it involve the determination of the rate by the Court. It merely disposes of the rate which has been mistakenly made, as preliminary to a new consideration of it by the Commission upon correct and proper grounds. (*Cin., N. O. & T. P. R. R. v. Inter. Com. Com.*, 162 U. S., 184, 238, 239; *Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S., 297.)

I therefore dissent from the judgment of the court, sustaining the demurrer and dismissing the bill.

MACK, *Judge*:

I concur in the above dissent.

155 And on the same day, to wit, the 20th day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Dismissing Bill of Complaint.*

156 In the United States Commerce Court, May Session, 1911.

No. 6.

THE EAGLE WHITE LEAD COMPANY et al., Petitioners,  
vs.

INTERSTATE COMMERCE COMMISSION and THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Respondents.

This cause coming on to be heard on demurrer to and motion to dismiss the Bill of Complaint herein, and having been argued by counsel, Mr. Francis B. James appearing for petitioner, Mr. R. Walton Moore and Mr. Frank W. Gwathmey for the Cincinnati, New Orleans & Texas Pacific Railway Company, and Mr. P. J. Farrell for the Interstate Commerce Commission, and upon due consideration thereof, it is now this 20th day of July, 1911, ordered, adjudged and decreed that the Bill of Complaint herein be and the same is hereby dismissed with costs.

By the Court:

MARTIN A. KNAPP,  
*Presiding Judge.*

157 And afterwards, to wit, on the 31st day of July, 1911, came the petitioners, by their solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain petition for appeal, in the words and figures following, to wit:

*Petition for Appeal.*

158 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; The Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

VS.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

Petition for Appeal from the United States Commerce Court to the Supreme Court of the United States.

The above named petitioners conceiving themselves and each of them aggrieved by the order, judgment and decree made and entered on the 20th day of July, 1911, in the above entitled cause, do hereby appeal from said order, judgment and decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceeding and papers upon which said order, judgment and decree was made, duly authenticated, or in lieu thereof as may be directed by this court, the original record be transmitted on appeal instead of a transcript thereof as provided for in Section 2 of the Act of June 18,

1910, creating the Commerce Court and defining its powers and jurisdiction, duly authenticated, may be sent to the Supreme Court of the United States.

Wherefore, the petitioners pray that said order, judgment and decree may be reversed and that said court may be directed to enter an order, judgment and decree in accordance with the prayer of the Bill.

FRANCIS B. JAMES,  
*Of Counsel for Petitioners.*

LITTLEFORD, JAMES, FROST & FOSTER,  
#1002-3-4-5 First National Bank Building,  
*Cincinnati, Ohio, Solicitors.*

Dated this 31st day of July, 1911.



The foregoing claim of appeal is allowed.

By the Court:

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,  
*Presiding Judge of the United  
States Commerce Court.*

Dated this 31st day of July, 1911.

160 And on the same day, to wit, the 31st day of July, 1911, came the petitioners, by their solicitors, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, their certain assignment of errors, in the words and figures following, to wit:

*Assignment of Errors.*

161 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation duly Organized under the Laws of the State of Ohio, and The United States of America, Respondents.

Assignment of Errors on Appeal from the United States Commerce Court to the Supreme Court of the United States.

The petitioners and each of them pray an appeal from the final order, judgment and decree of this court to the Supreme Court of the United States, and assign for errors:

First. The court erred in sustaining the demurrer to the Bill and dismissing the Bill.

Second. The court erred in not overruling the demurrer to the Bill.

Third. The court erred in sustaining the motion to dismiss the Bill.

162 Fourth. The court erred in not overruling the motion to dismiss the Bill.

Wherefore, the petitioners pray that said order, judgment and decree may be reversed and that said court may be directed to enter

an order, judgment and decree in accordance with the prayer of the Bill.

FRANCIS B. JAMES,  
*Of Counsel for Petitioners.*

LITTLEFORD, JAMES, FROST & FOSTER,  
#1002-3-4-5 *First National Bank Building,*  
*Cincinnati, Ohio, Solicitors.*

163 And on the same day, the 31st day of July, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

*Order Allowing Appeal.*

164 UNITED STATES OF AMERICA:

In the United States Commerce Court.

No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; The Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio; The United States of America, Respondents.

In this cause, the above named petitioners, by their solicitor, Francis B. James, having made their application in writing for an appeal from the decree therein rendered, on the 20th day of July, 1911, to the Supreme Court of the United States, it is, therefore, ordered, that said appeal be, and the same is hereby, granted, allowed and made returnable on the 30th day of August, 1911.

MARTIN A. KNAPP,  
*Presiding Judge United States Commerce Court.*

165 And afterwards, to wit, on the 26th day of August, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain bond, in the words and figures, following to wit:

*Appeal Bond.*

166 UNITED STATES OF AMERICA:

In the United States Commerce Court.

In Equity. No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; The Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners, Doing Business as Ratterman and Luth, Petitioners.

vs.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, and the United States of America, Respondents.

Bond on Appeal from the United States Commerce Court to the Supreme Court of the United States.

Know all men by these presents, That we, The Eagle White Lead Company, an Ohio Corporation; The Peters Cartridge Company, an Ohio corporation, The Charles Boldt Company, an Ohio corporation, The Overman & Schrader Cordage Company, an Ohio corporation and Henry Ratterman and Theodore Luth, partners doing business as Ratterman and Luth, as principals, and Fidelity & Deposit Company of Baltimore, Maryland, a corporation duly organized under the laws of said State, as surety, are held and firmly bound unto The Interstate Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company a corporation duly organized under the laws of the State of Ohio, and the United States of America, in the full and just sum of Five Hundred (\$500.00) Dollars, to pay to the said the Interstate Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and the United States of America, their certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents. Signed with our names and sealed with our seals and dated this 31st day of July, in the year of our Lord one thousand nine hundred and eleven.

Whereas lately at the United States Commerce Court for the 20th day of July, 1911, in a suit pending in said court between The Eagle White Lead Company, an Ohio corporation, The Peters Cartridge Company an Ohio corporation, The Charles Boldt Company an Ohio corporation, The Overman & Schraeder Cordage Company an Ohio corporation, Henry Ratterman and Theodore Luth partners doing business as Ratterman and Luth, and The Inter-

state Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and The United States of America, an order judgment and decree was rendered against said The Eagle White Lead Company an Ohio corporation, The Peters Cartridge Company an Ohio corporation, The Charles Boldt Company an Ohio corporation, The The Overman & Schraeder Cordage Company an Ohio corporation, Henry Ratterman & Theodore Luth partners doing business as Ratterman & Luth, and said The Eagle White Lead Company an Ohio corporation, The Peters Cartridge Company, an Ohio corporation, The Charles Boldt Company an Ohio corporation, The Overman & Schraeder Cordage Company an Ohio corporation, Henry Ratterman and Theodore Luth partners doing business as Ratterman & Luth having obtained an appeal and filed the original and a copy thereof in the Clerk's Office of the said court to reverse said order, judgment and decree in the aforesaid suit, and a citation directed to the said The Interstate

168 Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation duly organized under the laws of the State of Ohio, and the United States of America, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the — day of —, 1911, next.

Now the condition of the above obligation is such that if the said The Eagle White Lead Company an Ohio corporation, The Peters Cartridge Company an Ohio corporation, The Charles Boldt Company an Ohio corporation, The Overman & Schraeder Cordage Company an Ohio Corporation, Henry Ratterman and Theodore Luth, partners doing business as Ratterman & Luth, shall prosecute their appeal to effect and answer all costs and damages, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

THE EAGLE WHITE LEAD CO., [SEAL]

THE PETERS CARTRIDGE CO., [SEAL]

THE CHARLES BOLDT CO., [SEAL]

THE OVERMAN & SCHRAEDER

CO., [SEAL]

RATTERMAN & LUTH, [SEAL]

HENRY RATTERMAN & [SEAL]

THEODORE LUTH, [SEAL]

Partners as the Ratterman & Luth, SEAL.

By FRANCIS B. JAMES,

*Solicitor, Attorney & Counsel.*

FIDELITY & DEPOSIT CO. OF MD.,

By PAUL M. MILLIKIN, *Attorney-in-Fact.*

Signed, sealed and delivered in presence of:

— — —  
— — —

Allowed by the Court:

R. W. ARCHBALD,

*Associate Judge of the United  
States Commerce Court.*

*Præcipe for Transcript of Record.*

UNITED STATES OF AMERICA:

In the United States Commerce Court.

No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; The Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman & Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners Doing Business as Ratterman and Luth, Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio; the United States of America, Respondents.

To the clerk of said court:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal of the above named petitioners, and include in said transcript the following pleadings, proceedings and papers on file or of record, to-wit:

Bill of Complaint (U. S. Circuit Court, Southern District of Ohio—Equity No. 6668), filed Oct. 21, 1910.

Motion to consolidate cause # 6641 with this cause, filed Oct. 24, 1910.

Demurrer of the Interstate Commerce Commission to Bill of Complaint, filed Dec. 1, 1910.

Demurrer of C. N. O. & T. P. Co., filed Jan. 5, 1911.

Order entered by U. S. Commerce Court consolidating this case with Suit No. 5, filed Feb. 15, 1911.

Order permitting United States to intervene and granting 30 days to make defense, filed Apr. 3, 1911.

170 Motion of the United States to dismiss the petitions, filed May 2, 1911.

Order entered dismissing bill of complaint with costs, filed July 20, 1911.

Opinion and dissenting opinion, filed July 20, 1911.

Motion to amend bill, filed July 20, 1911.

Order permitting amendment to bill, filed July 20, 1911.

Petition for appeal, assignment of errors, order allowing appeal, citation on appeal, of petitioners, filed July 31, 1911.

FRANCIS B. JAMES,

*Solicitor for Petitioners.*

July 31, 1911.

171

In the United States Commerce Court.

No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE Peters Cartridge Company, an Ohio Corporation; The Charles Boldt Company, an Ohio Corporation; The Overman and Schrader Cordage Company, an Ohio Corporation, and Henry Ratterman and Theodore Luth, Partners Doing Business as Ratterman and Luth, Petitioners,

VS.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW Orleans & Texas Pacific Railway Company, a Corporation Duly Organized under the Laws of the State of Ohio, Respondents.

DISTRICT OF COLUMBIA, 88:

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 170, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the precept filed in the clerk's office of said court on the 31st day of July, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 30th day of August, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk*,  
By W. S. HINMAN,  
*Deputy Clerk*.

172 UNITED STATES OF AMERICA:

In the United States Commerce Court.

Filed Jul- 31, 1911. United States Commerce Court. G. F. Snyder,  
Clerk.

In Equity. No. 6.

THE EAGLE WHITE LEAD COMPANY, an Ohio Corporation; THE  
Peters Cartridge Company, an Ohio Corporation; The Charles  
Boldt Company, an Ohio Corporation; The Overman & Schra-  
der Cordage Company, an Ohio Corporation, and Henry Ratter-  
man and Theodore Luth, Partners, Doing Business as Ratterman  
and Luth, Petitioners,

VS.

THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, NEW  
Orleans & Texas Pacific Railway Company, a Corporation Duly  
Organized under the Laws of the State of Ohio, and the United  
States of America, Respondents.

*Citation to Appellees on Appeal from the United States Commerce  
Court to the Supreme Court of the United States.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Interstate Commerce Com-  
mission, The Cincinnati, New Orleans & Texas Pacific Railway  
Company, a corporation duly organized under the laws of the  
State of Ohio, and The United States of America, Greeting:

You and each of you are hereby cited and admonished to be and  
appear in the Supreme Court of the United States at the City of  
Washington in the District of Columbia, within thirty (30) days  
after the date of this writ and citation, pursuant to an appeal allowed  
by the United States Commerce Court and filed in the Clerk's Office  
of the United States Commerce Court in the District of Columbia on  
the 31st day of July, 1911, in a cause wherein The Eagle White Lead

173 Company, an Ohio corporation, The Peters Cartridge Com-  
pany an Ohio corporation, The Charles Boldt Company an  
Ohio corporation, The Overman & Schrader Cordage Com-  
pany an Ohio corporation, and Henry Ratterman and Theodore  
Luth, partners doing business as Ratterman and Luth, are appellants  
and you are appellees, to show cause, if any there be, why the order,  
judgment and decree rendered against said appellants as in said ap-  
peal mentioned should not be corrected, and why speedy justice  
should not be done the parties in that behalf.

Witness the Honorable Martin A. Knapp, Presiding Judge of the  
United States Commerce Court, this 31st day of July, 1911.

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,

*Presiding Judge of the United States Commerce Court.*

Service of the foregoing citation is hereby acknowledged this 31st day of July A. D. 1911.

BLACKBURN ESTERLINE,

*For the United States,*

F. W. GWATHMEY,

*For Cincinnati, New Orleans & Texas*

*Pacific Railway Co.*

CHAS. W. NEEDHAM,

*Attorney for the Interstate Commerce Commission and the Members Thereof.*

174 [Endorsed:] In Equity. No. 6. United States of America. In the United States Commerce Court. The Eagle White Lead Company, etc., et al., Petitioners, vs. The Interstate Commerce Commission, et al., Respondents. Citation to appellees on appeal from the United States Commerce Court to the Supreme Court of the United States. Francis B. James, of counsel for Petitioners. Littleford, James, Frost & Foster, Solicitors.

175 In the Supreme Court of the United States, October Term, 1911.

No. 774.

THE EAGLE WHITE LEAD COMPANY et al., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, et al., Appellees.

*Stipulation.*

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective solicitors, that the Exhibits A, B, and C, attached to the original bill of complaint or petition in the above-entitled cause are identical with Exhibits A, B, and C attached to the original bill of complaint or petition in James J. Hooker, et al., Appellants vs. Martin A. Knapp, et al., Appellees, No. 773, October Term, 1911, and that the printing in the record of the said Exhibits A, B, and C in No. 774 may be dispensed with and the exhibits printed in the Record in No. 773 may be used to all intents and purposes as though printed in the Record in case No. 774.

FRANCIS B. JAMES,

*Solicitor for the Appellants.*

WINFRED T. SIMSON,

*For the United States, Appellee.*

P. J. FARRELL,

*Solicitor for The Interstate Commerce*

*Commission, Appellee.*

R. WALTON MOORE,

*Solicitor for The C., N. O. & T. P. R. R. Co., Appellee.*



176 [Endorsed:] 774. 22,850. File No. 22,850. Supreme Court U. S., October Term, 1911. Term No. 774. The Eagle White Lead Company et al., Appellants, vs. The Interstate Commerce Commission et al. Stipulation to omit parts of record in printing. Filed November 28, 1911.

Endorsed on cover: File No. 22,850. United States Commerce Court. Term No. 774. The Eagle White Lead Company, The Peters Cartridge Company et al., appellants, vs. The Interstate Commerce Commission, The Cincinnati, New Orleans & Texas Pacific Railway Company, and The United States of America. Filed September 5, 1911. File No. 22,850.



Office Supreme Court, U. S.  
FILED.

SEP 18 1911

JAMES H. McKENNEY

CLERK

# UNITED STATES OF AMERICA

In The Supreme Court of The United States

JAMES J. HOOKER, et al,

*Appellants.*

vs.

MARTIN A. KNAPP, et al,

*Appellees.*

NO. 773, OCTOBER  
TERM, 1911.

## MOTION TO ADVANCE CAUSE AND TO GIVE SAME PRIORITY

FRANCIS B. JAMES,

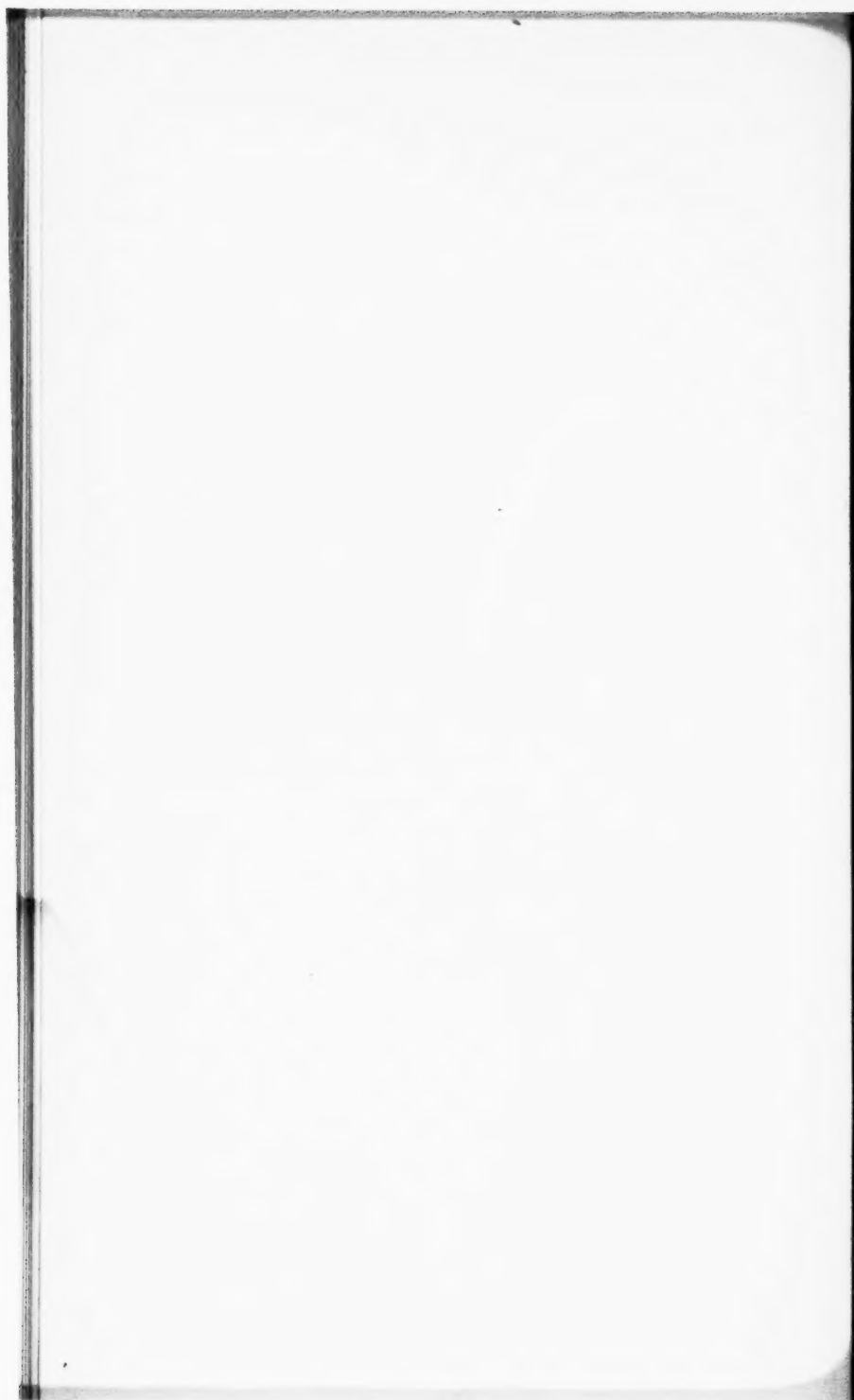
*Counsel for Appellants.*

LITTLEFORD, JAMES, FROST & FOSTER,

First National Bank Building,

Cincinnati, Ohio,

*Solicitors.*



# UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE UNITED STATES

JAMES J. HOOKER, et al,

*Appellants.*

vs.

MARTIN A. KNAPP, et al,

*Appellees.*

NO. 773, OCTOBER  
TERM, 1911.

## MOTION TO ADVANCE CAUSE AND TO GIVE SAME PRIORITY.

Now come appellants and represent to the court that this is an appeal from a final judgment and decree of the Court of Commerce under the provisions of Section 2 of "An Act to Create a Commerce Court", approved June 18, 1910, which said Section provides that "appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court". This cause in the Commerce Court is reported in 188 Fed. Rep. 242, the court dividing 3 to 2. Now, therefore,

Appellants move this court to advance this cause and give same priority in hearing and determination over all other causes except criminal causes in this court as in said Section 2 provided.

FRANCIS B. JAMES,

*Counsel for Appellants.*

**Littleford, James, Frost & Foster,**

First National Bank Building,

Cincinnati, Ohio,

*Solicitors.*



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# UNITED STATES OF AMERICA

In The Supreme Court of The United States

THE EAGLE WHITE LEAD  
COMPANY, et al,

*Appellants.*  
vs.

THE INTERSTATE COM-  
MERCE COMMISSION, et al,

*Appellees.*

NO. 774, OCTOBER  
TERM, 1911.

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## MOTION TO ADVANCE CAUSE AND TO GIVE SAME PRIORITY

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FRANCIS B. JAMES,  
*Counsel for Appellants.*

LITTLEFORD, JAMES, FROST & FOSTER,  
First National Bank Building,  
Cincinnati, Ohio,  
*Solicitors.*





# UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE UNITED STATES

THE EAGLE WHITE LEAD  
COMPANY, et al,

*Appellants.*

vs.

THE INTERSTATE COM-  
MERCE COMMISSION, et al,

*Appellees.*

NO. 774, OCTOBER  
TERM, 1911.

## MOTION TO ADVANCE CAUSE AND TO GIVE SAME PRIORITY.

Now come appellants and represent to the court that this is an appeal from a final judgment and decree of the Court of Commerce under the provisions of Section 2 of "An Act to Create a Commerce Court", approved June 18, 1910, which said Section provides that "appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court". This cause in the Commerce Court is reported in 188 Fed. Rep. 256, the court dividing 3 to 2. Now, therefore,

Appellants move this court to advance this cause and give same priority in hearing and determination over all other causes except criminal causes in this court as in said Section 2 provided.

FRANCIS B. JAMES,

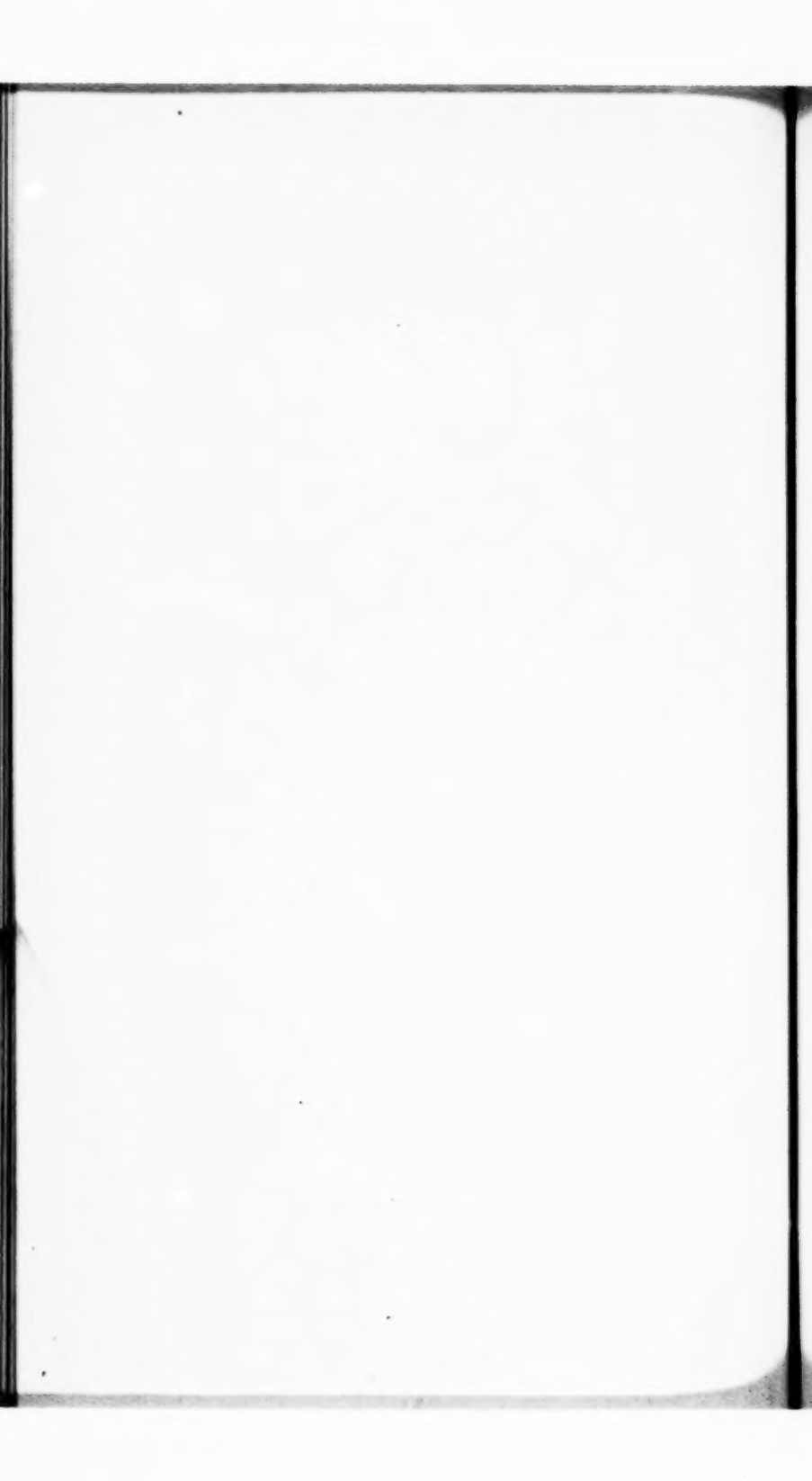
*Counsel for Appellants.*

**Littleford, James, Frost & Foster,**

First National Bank Building,

Cincinnati, Ohio,

*Solicitors.*



FILED.

JAN 2 1912

JAMES H. MCKENNEY,  
CLERK.

# United States of America In the Supreme Court of the United States

JAMES J. HOOKER, et al,  
*Appellants,*

— vs. —

MARTIN A. KNAPP, et. al,  
*Appellees.*

October Term, 1911  
No. 773.

THE EAGLE WHITE LEAD CO., et al,  
*Appellants,*

— vs. —

THE INTERSTATE COMMERCE  
COMMISSION, et al,  
*Appellees.*

October Term, 1911  
No. 774.

## Brief on Behalf of Appellants.

[Appeal from decision Commerce Court (vote of 3 to 2)  
sustaining demurrer to Bill of Complaint, Cases  
5 and 6, Consolidated 188 Fed. Rep.  
242 and 256].

FRANCIS B. JAMES,  
*Of Counsel.*

LITTLEFORD, JAMES, BALLARD, FROST & FOSTER,  
No. 1002-3-4-5 First National Bank Bldg.,  
Cincinnati, Ohio,  
Nos. 805-6-7-8 Westory Building,  
Washington, D. C.  
*Solicitors.*



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United States of America.

**In the Supreme Court of the United States**

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James J. Hooker, et al,

—vs.—

Martin A. Knapp, et al,

*Appellants,*

*Appellees.*

} October Term,  
1911,  
No. 773.

The Eagle White Lead Company, et al,

—vs.—

The Interstate Commerce Commission, et al,

*Appellants,*

*Appellees.*

} October Term,  
1911.  
No. 774.

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**BRIEF ON BEHALF OF APPELLANTS.**

**PART FIRST.**

**STATEMENT OF THE CASE**

**(a) Preliminary.**

On the 14th day of July, 1910, James J. Hooker and E. E. Williamson, respectively president and secretary of The Receivers' & Shippers' Association of Cincinnati, Ohio, brought their Bill of Complaint against Martin A. Knapp, et al, constituting The Interstate Commerce Commission,

and The Cincinnati, New Orleans & Texas Pacific Railway Company in the Circuit Court of the United States for the Southern District of Ohio, Western Division, No. 6641. This case was transferred to the United States Commerce Court and numbered In Equity No. 5. This cause is now in this court in appeal as No. 773, October Term, 1911.

On October 24, 1910, The Eagle White Lead Company, The Peters Cartridge Company, The Charles Boldt Company, The Overman & Schrader Cordage Company, and Ratterman & Luth brought their Bill of Complaint against The Interstate Commerce Commission and The Cincinnati, New Orleans & Texas Pacific Railway Company in The United States Circuit Court for the Southern District of Ohio, Western Division, No. 6668. This case was transferred to the United States Commerce Court and numbered In Equity No. 6. This cause is now in this court on appeal as No. 774, October Term, 1911.

**The two Bills are practically identical**, the first, case No. 773, being brought by The Receivers' & Shippers' Association on behalf of all the shippers in Cincinnati, and the second, case No. 774, being brought by the individual shippers directly affected on behalf of themselves and all others aggrieved in like manner.

**The United States Commerce Court consolidated the two cases.**

**For convenience and to avoid repetition and by reason of a few immaterial errors in the Bill of Complaint in case No. 773, in this Court, references in this brief will be to Bill of Complaint in case No. 774 in this Court.**

These Bills of Complaint seek to set aside and annul the order of The Interstate Commerce Commission made in case No. 1542 pending before that body, which order

while bearing the printed date of February 17, 1910, was in fact rendered on the 24th day of May, 1910 (Bill of Complaint; Record case No. 774, p. 12). The language of this order is set forth in Exhibit A Bill of Complaint, Case No. 773, p. 83 and stipulated into Case 774, Record p. 90. Particular attention is called to the fact that the "report" of Commission is "*referred to and made a part*" of the order.

To these Bills of Complaint The Interstate Commerce Commission and the C. N. O. & T. P. R. R. Co. filed demurrers which in effect raised an issue on the merits. (Record Case No. 773, pp. 97-98; Case No. 774 pp. 56-58). The United States moved to dismiss. (Record Case No. 773, pp. 103; Case No. 774, pp. 61-62). The effect of the demurrers and motion to dismiss is to admit as true all the allegation of fact contained in the Bills of Complaint but to dispute the legal deductions sought to be made therefrom.

*1 Bates on Federal Equity Procedure, Sec. 209.*

#### **(b) The Case Stated.**

Throughout this brief for brevity The Cincinnati, New Orleans & Texas Pacific Railway Company will be abbreviated C. N. O. & T. P. Ry. Co. The Interstate Commerce Commission will be abbreviated Commission; The Louisville & Nashville Railroad Company will be abbreviated L. & N. R. R. Co.; The Nashville, Chattanooga & St. Louis Railway will be abbreviated N. C. & St. L. Ry.

The C. N. O. & T. P. Ry. Co., an Ohio corporation, is a common carrier engaged in the transportation of goods, wares and merchandise by Railroad from the City of Cincinnati as its northern terminus and to the City of Chattanooga as its southern terminus, a distance of 336 miles. It is a single trunk line without branches and its operation is entirely

distinct from any other railroad or railroad company (Bill of Complaint; Record Case No. 774, p. 3).

At all the times mentioned in the Bill of Complaint said C. N. O. & T. P. Ry. Co. duly filed and published a schedule of rates on goods, wares and merchandise enumerated in first, second, third, fourth, fifth and sixth classes of Southern Classification, which Southern Classification was adopted by the C. N. O. & T. P. Ry. Co. (Bill of Complaint, paragraphs 3 and 7; Record Case No. 774, pp. 2 and 3). By said classification there were charged on the goods, wares and merchandise embraced in said classes the following schedule of freight charges in cents per hundred pounds (Bill of Complaint, paragraph 7; Record Case No. 774, p. 3) to-wit:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Cents Per Hundred Pounds</i> .....	76	65	57	47	40	30

For brevity this will be called "76 cent schedule."

On November 24, 1894, The Commission in case No. 322 condemned this schedule as unjust and unreasonable and substituted in place thereof the following (Bill of Complaint, paragraph 9; Record Case No. 774, p. 4) to-wit:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Cents Per Hundred Pounds</i> .....	60	54	40	30	24	22

For brevity this will be called "60 cent schedule."

In *Interstate Commerce Commission vs. C. N. O. & T. P. Ry. Co.* (also known as the *Maximum Rate Case*) (May 24, 1897) 167 U. S. 479, it was held that under the Interstate Commerce Act of February 4, 1887 (24 Stat. 379) that while power was conferred upon the Commission to declare a rate unjust and unreasonable and to order a carrier to cease and desist from maintaining such rate, that said act did not confer upon the Commission power to substitute

in lieu thereof a just and reasonable rate and annulled the said "60 cent schedule."

At the times alleged in the Bill of Complaint the City of Cincinnati owned said line of railroad between the City of Cincinnati, Ohio, and Chattanooga, Tennessee. This road was constructed by the City of Cincinnati and opened for business in the year 1880. It originally cost \$18,000,000 and the City of Cincinnati subsequently spent \$2,500,000 for terminal facilities, making the total cost of the Southern Railroad to the City of Cincinnati \$20,500,000 (Bill of Complaint, paragraph 10; Record Case No. 774, p. 4).

The C. N. O. & T. P. Ry. Co. leased this property and is still leasing said property on a basis of rental which returned to the City of Cincinnati about 6% prior to 1906 and about 5% subsequent to that date (Bill of Complaint, paragraph 11; Record Case No. 774, p. 4).

The C. N. O. & T. P. Ry. Co. owns its own equipment and never did have any interest in the Southern Railroad beyond the right to use the property for the terms of the leasehold (Bill of Complaint, paragraph 13; Record Case No. 774, p. 4).

The capital stock of the C. N. O. & T. P. Ry. Co. for the years 1903 to 1908, both inclusive, was \$5,000,000 divided into \$3,000,000 worth of common stock and \$2,000,000 worth preferred stock, and about the year 1908 it increased its capital stock by adding \$500,000 worth of preferred stock making its entire issued capital stock for 1908, \$5,500,000 (Bill of Complaint, paragraph 14; Record Case No. 774, pp. 4-5).

The value of the property of the C. N. O. & T. P. Ry. Co. between the years 1903 and 1908, both inclusive, was \$5,000,000, and after 1908 was \$5,500,000 and was all the property of the C. N. O. & T. P. Ry. Co. devoted to and

employed in the public service and use and for the public convenience: (Bill of Complaint, paragraph 15; Record Case No. 774, p. 5).

The number of tons of freight hauled, the number of tons of freight hauled one mile, the number of tons of freight hauled one mile per one mile of road, the gross earnings per mile, and the receipts per ton per mile in cents between the years 1884 and 1908 are set forth in the Bill of Complaint (Bill of Complaint, paragraphs 16 and 17; Record Case No. 774, pp. 5-6).

The net earnings between the years 1884 and 1902 are also set forth in the Bill of Complaint (Bill of Complaint, pp. 7-8, paragraph 18). This table, however, is not complete because a large amount of earnings were charged to operating expenses between these dates which belonged to capital account (Bill of Complaint, paragraph 19; Record Case No. 774, p. 7).

Between the years 1903 and 1908 The C. N. O. & T. P. Ry. Co. expended out of net earnings from operation some \$11,119,427.58 for permanent improvements and rolling stock, (Bill of Complaint, paragraph 20; Record Case No. 774, pp. 7-8).

Owing to the methods of keeping account by the C. N. O. & T. P. Ry. Co. it is impossible to give the amount expended each year out of net earnings for the permanent improvements and new rolling stock, but the sum averaged \$1,853,237.93 for the years 1903 to 1908, both inclusive. (Bill of Complaint, paragraphs 20 and 21; Record Case No. 774, pp. 7-8).

The annual net profits of operation after deducting rentals, interest, taxes, operating expenses and every other



expense and charge between the years 1903 and 1908, both inclusive, (Bill of Complaint, paragraph 23; Record Case No. 774, p. 9), are as follows:

<i>Year</i>	<i>Net Profits.</i>
1903 . . . . .	\$2,316,423.16
1904 . . . . .	2,227,571.58
1905 . . . . .	2,235,687.53
1906 . . . . .	2,241,002.27
1907 . . . . .	2,187,882.82
1908 . . . . .	2,120,747.84

Total for 6 years . . . . .	\$13,329,315.20
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This would show a net profit per mile of road for the years 1903 to 1908, both inclusive, (Bill of Complaint, paragraph 24; Record Case No. 774, p. 10), as follows:

<i>Year</i>	<i>Net Profit per Mile.</i>
1903 . . . . .	\$6,894.11
1904 . . . . .	6,629.64
1905 . . . . .	6,653.83
1906 . . . . .	6,669.64
1907 . . . . .	6,511.55
1908 . . . . .	6,311.74

It will thus be seen that the average net earnings of the whole property between the years 1903 and 1908, both inclusive, was \$2,221,552.53 upon a capitalization and value of property of \$5,000,000. *This would show a yearly average of net profits between the years 1903 and 1908 of 44.43% per annum,* (Bill of Complaint, paragraphs 25, 26; Record Case No. 774, p. 10).

If the 60 cent schedule of rates above referred to would have been applied during the years 1903 to 1908, both inclusive, on the same tonnage the net revenue would have been reduced \$188,651.30 per year, and the average net profit

per year would have been reduced from \$2,221,552.53 to \$2,032,871.23 and on the \$5,000,000 capitalization, representing the value of the property devoted to the public service, would have reduced *the yearly average net profit from 44.43% to 40.66% per annum*, (Bill of Complaint, paragraph 27; Record Case No. 774, p. 10).

If the "70 cent schedule" hereinafter referred to would have been applied on the same tonnage it would have reduced the net revenue \$12,000 per year and reduced the net profits from \$2,221,552.53 per year to \$2,209,552.53, and have reduced *the yearly average net profits from 44.43% per annum to 44.18% per annum, a reduction of just .25 or one-fourth of 1%* (Bill of Complaint, paragraph 27-a; Record Case No. 774, pp. 10-11).

On April 30, 1908, The Receivers' & Shippers' Association filed its complaint with The Commission complaining of said 76 cent schedule (Bill of Complaint, paragraph 28; Record Case No. 774, p. 11), same being No. 1542 on the docket of the Commission.

The Commission entered upon an investigation of the complaint upon the pleadings and the evidence, the facts heretofore given being conceded and undisputed. The evidence being closed on the . . . day of January, 1909, it was duly submitted to the Commission on the 10th day of May, 1909, and on the 24th day of May, 1910, the Commission made, handed down, filed and entered a report in writing in respect thereto, which said report stated the findings of fact and conclusion of said Commission together with its decision, order and requirement in the premises, and which report contained the findings of fact and conclusions thereon of said Commission *and that said report was referred to and made part of the order entered therein*. Although the report

was only handed down on the 24th day of May, 1910, it was dated February 17, 1910. Said complete report (including the order) is attached to the Bill of Complaint and made part thereof and identified as Exhibit "A." (Bill of Complaint; paragraphs 29 and 30, Record Case No. 774, pp. 11-12.)

The Commission in its report, findings of fact and conclusions thereon and its order and requirements therein, *which said report, findings of fact and conclusions thereon were by said Commission referred to and made part of the order*, the Commission duly found that the questions whether the rates upon the numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee, over said railroad were inherently unreasonable and unreasonable considered in and of themselves, and whether rates upon said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee, over said railroad were extortionate, and whether the rates upon said numbered classes from the City of Cincinnati, Ohio, to the City of Chattanooga, Tennessee, over said railroad were too high, were presented to said Commission (Bill of Complaint; paragraph 31, sub-paragraph a; Record Case No. 774, p. 12).

The Commission found that the Southern Railway is a single trunk line without any branches, running from the City of Cincinnati to the City of Chattanooga, that its operation was in fact entirely distinct from the Southern Railway Company and that the case must be disposed of to all intents and purposes as if the C. N. O. & T. P. Ry. Co. was entirely distinct from the Southern Railway Company both in name as well as in operation; that the C. N. O. & T. P. Ry. Co. had gross earnings more than the gross earn-

ings of most railway systems; that the C. N. O. & T. P. Ry. Co. had no interest in the property of the Cincinnati Southern Railroad beyond its right to use it for the stipulated term; that the C. N. O. & T. P. Ry. Co. had no right to pledge its bridges or tracks to raise money and was merely entitled to a fair return upon the value of the property devoted by it to the public use and it was not entitled to have property acquired by it paid for by the public; that if the stockholders of the C. N. O. & T. P. Ry. Co. had entered upon their investment and failed to provide necessary funds with which to carry it on, they had no right to raise such funds to impose unreasonable rates; and that the C. N. O. & T. P. Ry. Co. and its stockholders had no right to make a rate unreasonable for the purpose of supplying money to make permanent improvements by way of bridges, additional tracks and otherwise (Bill of Complaint, paragraph, 31 sub-paragraphs b, c, d, e, f, g, h and i; Record Case No. 774, pp. 12-16.

*The Commission thereupon stated its conclusions as follows:*

**"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."** (Bill of Complaint, paragraph 31, subdivision i; Record Case No. 774, pp. 15-16).

As above stated, the rates formerly found reasonable by the Commission in said case No. 322 in cents per hundred pounds were as follows:

<i>Class</i> .....	1	2	3	4	5	6
<i>Cents Per Hundred Pounds</i> .....	60	54	40	30	24	22

Same being said "60 cent schedule."

**The foregoing conclusion of the Commission was a distinct finding that the 76 cent schedule was unjust and unreasonable and that a 60 cent schedule was just and reasonable and should be substituted therefor,** (Bill of Complaint, paragraph 32; Record Case No. 774, p. 16).

#### (c) **Remedy given by Commission.**

The Commission in said case No. 1542 instead of giving a remedy by prescribing said 60 cent schedule of rates in lieu of said 76 cent schedule or rates, substituted a 70 cent schedule of rates as follows:

"We hesitate at this time to make wide spread and far reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive. In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think that some **slight** reduction should be made in these rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory. In the readjustment of 1905 rates to Chattanooga from the Ohio River were not reduced, although those from the east were. We are of the opinion that the present rates are unreasonable, and that rates should be established

upon the numbered classes, not exceeding in cents per hundred pounds the following:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Rates</i> .....	70	60	53	44	38	29

and it will be so ordered." (Bill of Complaint, paragraph 61; Record Case No. 774, pp. 45-46).

It seems rather odd that the reduction in cents per hundred pounds upon the various classes should be as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Reduction in Cents per 100 pounds</i>	6	5	4	3	2	1

It will also be noticed that the Commission entirely failed to find in its findings, conclusions, order and requirement that the proposed 70 cent schedule of rates was just and reasonable (Bill of Complaint, paragraph 62; Record Case 774, pp. 46-47).

The order of the Commission required the C. N. O. & T. P. Ry. Co. to file a new schedule of rates on or before the 15th day of July, 1910, not exceeding the 70 cent schedule and to remain in force not less than two years, (Bill of Complaint, paragraph 33; Record Case No. 774, p. 16).

The C. N. O. & T. P. Ry. Co. thereupon did duly publish and file with The Interstate Commerce Commission effective July 15, 1910, said 70 cent schedule of rates, (Bill of Complaint, paragraph 67; Record Case No. 774, p. 51).

(d) **Finding of Commission Annulled because of The L. & N. R. R. and N. C. & St. L. R. R. Co.**

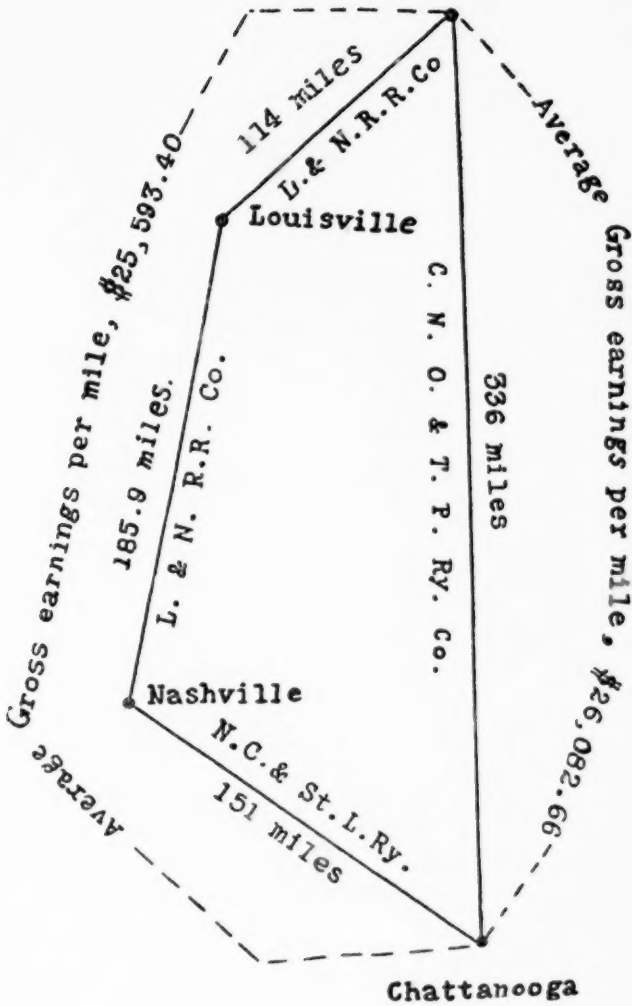
The C. N. O. & T. P. Ry. Co. is a single track railroad from Cincinnati to Chattanooga, a distance of 336 miles without branches, and has an average gross earnings per mile of \$26,082.66. The L. & N. R. R. Co. runs from Cincinnati to Louisville and from Louisville to Nashville, the distance from Cincinnati to Louisville being 114 miles, and the distance from Louisville to Nashville being 185.9 miles. The distance therefore from Cincinnati to Nashville over the L. & N. R. R. Co. is 299.9 miles. Nashville is connected with Chattanooga, Tennessee by the N. C. & St. L. Ry. Co., the distance from Nashville to Chattanooga being 151 miles, and the distance from Cincinnati to Chattanooga by way of the L. & N. R. R. Co. from Cincinnati to Louisville, from Louisville to Nashville and from Nashville to Chattanooga over the N. C. & St. L. Ry. Co. is 450.9 miles. The direct haul therefore from Cincinnati to Chattanooga over the C. N. O. & T. P. Ry. Co. is 114.9 miles shorter than the indirect haul by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. from Cincinnati to Louisville, from Louisville to Nashville and from Nashville to Chattanooga. The haul therefore from Cincinnati to Chattanooga by way of the C. N. O. & T. P. Ry. Co. is about 25 per cent. less than the haul to Chattanooga by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. by way of Louisville and Nashville. The haul from Cincinnati to Chattanooga by way of the L. & N. R. R. Co. and the N. & C. St. L. Ry. Co. by way of the L. & N. R. R. Co. is about 33 per cent. greater than the haul from Cincinnati to Chattanooga over the C. N. O. & T. P. Ry. Co. The average gross earnings per mile over the 336 miles of the C. N. O. & T. P. Ry. Co. is \$26,082.66 and the average gross earnings per mile between Cincinnati and Chattanooga over the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co.

by way of the L. & N. R. R. Co. is \$25,593.40. The average gross earnings per mile over each road is therefore practically the same. The gross earnings however for the 336 miles of the C. N. O. & T. P. Ry. Co. would be \$8,763,773.76, and the gross earnings for the 450.9 miles of the L. & N. R. R. Co. and the N. C. & St. L. between Cincinnati and Chattanooga by way of the L. & N. R. R. Co. would be much larger, to-wit, \$11,540,064.06.

A diagram showing the principal of the foregoing facts is inserted in the Bill of Complaint and made part thereof and admitted to be true by the demurrer (Bill of Complaint, Record Case No. 773, p. 26 and Record Case 774, p. 26) and also inserted in Exhibit X to this brief and for convenience is repeated as follows, to-wit:



Cincinnati



The L. & N. R. R. Co. operated 4,365.2 connected miles of railroad in the state of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina, which are set forth in great detail and particularity in the Bill of Complaint, (Bill of Complaint, paragraph 39; Record Case No. 774, pp. 20-23) and are shown in heavy red lines on plat attached to Bill of Complaint as Exhibit "B" and attached to this brief (Record case No. 773, p. 95; stipulated into case 774, p. 90.)

The N. C. & St. L. R. R. Co. operated 1,230.05 connected miles of railroad in the states of Kentucky, Tennessee, Alabama and Georgia, which are set forth in great detail and particularity in the Bill of Complaint (Bill of Complaint, paragraph 40; Record Case No. 774, pp. 23-24) and shown in heavy yellow lines on plat Exhibit "B".

That the L. & N. R. R. Co. was in a flourishing condition is shown from the following facts in reference thereto:

The net income per annum of said L. & N. R. R. Co. for the years 1903 to 1907, both inclusive, after deducting operating expenses (including maintenance), fixed charges, interest, rent, taxes and sinking fund payment, was

1903.....	\$6,211,047
1904.....	6,668,171
1905.....	6,827,039
1906.....	6,348,374
1907.....	6,450,521

The above figures were a part of the record in said case No. 1542. (Bill of Complaint par. 45; Record Case No. 774, pp. 26-27).

The capital stock representing the balance of the property employed in and devoted to public service and use and for the public convenience not compensated under items of said fixed charges, interest, rents and sinking fund

payment of the said L. & N. R. R. Co., for the years 1903 to 1907, both inclusive, was as follows:

1903.....	\$60,000,000
1904.....	60,000,000
1905.....	60,000,000
1906.....	60,000,000
1907.....	60,000,000
1908.....	60,000,000

The respective amounts shown as net income per annum for the years 1903 to 1908, both inclusive, would produce a percentage return on the said amount of capital stock for said years, as follows:

Percentage Return on Capital Stock.

	Per cent.
1903.....	10.35
1904.....	11.11
1905.....	11.38
1906.....	10.58
1907.....	10.75
1908 (panic year).....	8.25

The sums mentioned below were credited to the Profit and Loss Account of said L. & N. R. R. Co. for the years ending June 30, 1903 to 1908, inclusive:

Balance to the credit of Profit and Loss Account, June 30, 1903.....	\$ 8,292,710.23
Balance to the credit of Profit and Loss Account, June 30, 1904.....	11,684,424.12
Balance to the credit of Profit and Loss Account, June 30, 1905.....	14,899,106.26
Balance to the credit of Profit and Loss Account, June 30, 1906.....	18,130,045.82
Balance to the credit of Profit and Loss Account, June 30, 1907.....	20,827,512.88
Balance to the credit of Profit and Loss Account, June 30, 1908.....	19,015,000.15

In the year 1881 said L. & N. R. R. Co. declared a stock dividend to its stockholders of 100 per cent.

The result of the operations of the L. & N. R. R. Co. for the years ending June 30, 1909 and 1910 are as follows:

	1909	1910
Gross earnings.....	\$45,425,891	\$52,433,382
Expenses.....	29,627,499	34,864,347
Net earnings.....	15,798,392	17,569,035
Taxes.....	1,437,992	1,602,632
Operating income.....	14,360,400	15,966,402
Other income.....	1,395,124	1,733,363
Total income.....	15,755,524	17,699,766
Interest, rents, etc.....	7,167,589	7,286,510
Net profits.....	8,587,935	10,413,256

that the net profits of \$8,587,935 and \$10,413,256 are equivalent to 14.31 and 17.35 per cent. respectively, on said \$60,000,000 capital stock, (Bill of Complaint, paragraphs 45, 45-a, 45-b and 45-c; Record Case No. 774, pp. 26-28).

Attention is called to the further findings of fact by the Commission (Bill of Complaint, paragraph 43; Record Case No. 774, p. 24), to-wit:

(1) Gross earnings C. N. O. & T. P. Ry. Co. 336 miles from Cincinnati, Ohio, to Chattanooga, Tennessee, for the year 1907, over \$26,000 per mile.

(2) Gross earnings for that portion of the line of the L. & N. R. R. Co. between Cincinnati, Ohio, and Louisville, Kentucky, a distance of 114 miles, for the year 1907, \$25,000 per mile.

(3) Gross earnings for that portion of the line of the L. & N. R. R. Co. between Louisville, Kentucky, and Nashville, Tennessee, a distance of 185.9 miles, for the year 1907, \$30,000 per mile.

(4) Gross earnings of the N. C. & St. L. Ry. Co. between Hickman and Chattanooga, a distance of 320 miles, for the year 1907, over \$20,000 per mile.

(5) Gross earnings for the entire L. & N. R. R. System operated by the L. & N. R. R. Co., main line and branches, of 4,365.2 miles in the States of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina about \$11,000 per mile.

Attention is called to the diagram in the Bill of Complaint, page 31, which diagram is repeated in page 14 of this brief, that the immediate competitive lines between Cincinnati, Ohio, and Chattanooga, Tennessee, are on the one hand the C. N. O. & T. P. Ry. Co. with a mileage of 336 miles, and on the other hand the L. & N. R. R. Co. from Cincinnati to Louisville a distance of 114 miles, and the L. & N. R. R. Co. from Louisville, Kentucky, to Nashville, Tennessee, a distance of 185.9 miles, and the N. C. & St. L. Ry. Co. from Nashville, Tennessee, to Chattanooga, Tennessee, a distance of 151 miles, a total of 450.9 miles.

It will also be noticed that the schedule of rates challenged was a schedule of rates from Cincinnati, Ohio to Chattanooga, Tennessee over the C. N. O. & T. P. Ry. Co., a distance of 336 miles over a single trunk line without branches.

The Commission having found that the 76 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. a distance of 336 miles was unjust and unreasonable and held that a 60 cent schedule of rates between Cincinnati, Ohio, and Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. a distance of 336 miles was just and reasonable, then proceeded to take

away the effect of its conclusion by denying this schedule because of the trunk lines and branches operated by the L. & N. R. R. Co., a distance of 4,365.2 miles of railroad in the states of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina (See map Exhibit "B" attached to Bill of Complaint Case 773, p. 95; stipulated into Case 774, p. 90 and copy attached to this brief).

Some of the grounds of complaint in this case are as set forth in the Bill of Complaint (paragraphs 46 to 53, both inclusive; Record Case No. 774, pp. 28-35), as follows:

"(46) Your orators further show that the schedule of rates complained of in said case No. 1542, from Cincinnati, Ohio, to Chattanooga, Tennessee, was said 76 cent schedule in effect over said Cincinnati Southern Railway, a single trunk line without branches, running from Cincinnati, Ohio, to Chattanooga, Tennessee, as an unjust and unreasonable schedule of rates as in and of itself; and that said complaint in said case No. 1542 was not a complaint against an unjust and unreasonable individual rate, nor a complaint against an unjust and unreasonable specific rate on a given article; but that said complaint in case No. 1542 was a complaint against said 76 cent schedule of rates maintained by said Cincinnati Southern Railway, operated by said C. N. O. & T. P. Ry. Co., taken by itself as a single trunk line without branches running from Cincinnati, Ohio, to Chattanooga, Tennessee.

"Your orators further show that said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry., or both of them, nor against any joint

or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, Kentucky, thence over the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee; that said complaint in said case No. 1542 was not a complaint as to any schedule of rates, joint rates or through rates, maintained by the said L. & N. R. R. Co. on its division, extending from Mobile, Alabama, to New Orleans, La., nor any of its numerous divisions or branches; that said complaint in said case No. 1542 was not a complaint as to any of the rates or schedules of rates, joint rates or through rates maintained by said N. C. & St. L. Ry. on its division between Paducah, Kentucky, and Memphis, Tennessee, nor on any of its numerous divisions or branches.

"Your orators further show that the complaint in said case No. 1542 was not directed against the return on the value of the property employed in and devoted to the public use and service and for the public convenience by said L. & N. R. R. Co. or said N. C. & St. L. Ry. or both of them.

"(47) Your orators further show that although said complaint in said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry. or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, as more particularly set forth in paragraph (46) of this Bill of Complaint; yet said Commission tried case No. 1542 as if said Commission was called upon in said case No. 1542 to adjust the rates on the entire lines (including main

line and branches) of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

"Said Commission in adjusting the schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. in its report in said case No. 1542, used language as follows:

"Now, in adjusting the rates of the Louisville and Nashville or the Nashville, Chattanooga and St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?

"Commission rates are usually the same for all lines, both main lines and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch-line business when it reaches the main line is surplus traffic from which a larger profit is made. *It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates up on the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.*" (18 I. C. C. Rep., p. 465).

It will be noted that the C. N. O. & T. P. Ry. Co. has no branches and this fact was distinctly found by the Commission. (Bill of Complaint par. 31, sub par.(c); Record Case No. 774, p. 13

"Your orators further show that said Commission in adjusting the schedules of rates of said L. & N. R. R. Co. and said N. C. & St. L. Ry. in said case No. 1542, although the schedules of rates of said two companies were not complained of, nor were the schedules of rates of said two companies at issue in said case No. 1542, *took into consideration the entire main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., the gross earn-*



ings per mile for 1907 of the L. & N. R. R. Co. being about \$11,000, and for the same year the gross earnings per mile of the N. C. & St. L. Ry. being less than \$10,000, and determined that said 70 cent schedule of rates should be a schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of said L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, thence by the main line to the said N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, a distance of 450.9 miles; and having thus adjusted a schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, thereupon determined and prescribed the said 70 cent schedule of rates as a schedule of rates to be maintained by the said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, over its single trunk line without branches, 336 miles in length, although the gross earnings per mile of the said C. N. O. & T. P. Ry. Co. for the year 1907 exceeded \$26,000; that said Commission by its order in said case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, based upon a schedule of rates adjusted for the main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., when said 70 cent schedule of rates thus adjusted for the said L. & N. R. R. Co. and said N. C. & St. L. Ry. if applied to and prescribed for the single trunk line railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, operated by said C. N. O. & T. P. Ry. Co., would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C.

**N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience**, arbitrarily, oppressively, unconstitutionally, unlawfully and by mere fiat, deprive said parties aggrieved of their property without due process of law in the manner more particularly set forth in paragraph (36) of this Bill of Complaint; and deprive said parties aggrieved of their private property without just compensation in the manner more particularly set forth in paragraph (37) of this Bill of Complaint.

“(48) Your orators further show that said Commission in its report in said case No. 1542 laid down the following rule:

“ ‘In *In the Matter of Proposed Advances in Freight Rates*, 9 I. C. C. Rep., 382, the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the *Spokane case*, 15 I. C. C. Rep., 376, the same subject was considered and the same conclusion reached. The last affirmance of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.*, 15 I. C. C. Rep., 555, in which the rule is stated by Clark, Commissioner, as follows:

“ “ ‘In the *Spokane case*, 15 I. C. C. Rep., 376, we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

““As before suggested, we cannot, in determining competitive rates, select that railroad which is the shortest or most advantageously situated, and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines.’

“‘We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits.’ (18 I. C. C. R. 464.)

“Your orators further show that as above set forth in paragraph (44) the average gross earnings per mile of the route from Cincinnati, Ohio, to Chattanooga, Tennessee, via the L. & N. R. R. Co. and the N. C. & ST. L. Ry. through Louisville and Nashville is approximately the same as the gross earnings per mile of the direct line from Cincinnati, Ohio, to Chattanooga, Tennessee, via the C. N. O. & T. P. Ry. Co., and that therefore, applying the above rule within its proper limits, the said two routes from Cincinnati, Ohio, to Chattanooga, Tennessee, should be treated as equal.

“Your orators further show that said Commission in its report in said case No. 1542, failed to apply said rule within its proper limits, but as more particularly set forth in paragraph (47) of this Bill of Complaint, said Commission instead of limiting its consideration to the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, and the main line of the N. C. & St.

L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, considered the entire lines, including main line and branches, of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

“(49) Your orators further show that in said case No. 1542 no complaint was made against the unjustness nor unreasonableness of the schedule of rates from Louisville, Kentucky, to Chattanooga, Tennessee; nor of the unjustness nor the unreasonableness of the schedule of rates from other Ohio River crossings to Chattanooga, Tennessee; nor of the unjustness nor unreasonableness of the schedule of rates from Memphis, Tennessee, to Chattanooga, Tennessee; nor of the unjustness nor unreasonableness of the schedule of rates from Memphis, Tennessee, to Birmingham, Alabama; nor of the unjustness nor unreasonableness of the schedule of rates from the Ohio River to Atlanta, Georgia; nor of the unjustness nor unreasonableness of the schedule of rates from the east to Atlanta, Georgia; that notwithstanding there was no complaint against the schedules of rates as described above in this paragraph, and notwithstanding none of said described schedules of rates were at issue in said case No. 1542, said Commission arbitrarily tried said case No. 1542 as if the said schedules of rates as described above in this paragraph were complained of as being unjust and unreasonable; that said Commission in its report of said case No. 1542 used the following language with reference to the schedules of rates as described above in this paragraph:

““In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the

purpose is to obtain a general reduction to this southern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

“The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

“The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis and San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially

exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a re-opening of that contest.

“It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East as was the case in 1905.

“It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory., (18 I. C. C. R. 462-463.)

“Your orators further show that said Commission in its report in said case No. 1542 used language as follows:

“In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think some slight reductions should be made in the rates to Chattanooga. Railroads operating south from the Ohio River are among the most prosperous in this southern territory., (18 I. C. C. R. 466 and 467.)

“Your orators further show that said commission by its order in said case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee,

for a period of not less than two years from July 15, 1910. based upon the numerous schedules of rates above described in this paragraph, which said 70 cent schedule of rates if applied to and prescribed for the single trunk line railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, operated by said C. N. O. & T. P. Ry. Co., **would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C. N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience,** arbitrarily, oppressively, unconstitutionally, unlawfully, and by mere fiat, deprive said parties aggrieved of their property without due process of law in the manner more particularly set forth in paragraph (36) of this Bill of Complaint, and deprive said parties aggrieved of their private property without just compensation in the manner more particularly set forth in paragraph (37) of this Bill of Complaint.

“(50) Your orators further show that when the parties aggrieved tender to said C. N. O. & T. P. Ry. Co. shipments of said goods, wares, and merchandise under Classes 1, 2, 3, 4, 5 and 6, respectively, for transportation over said single trunk line without branches of said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, said parties aggrieved are entitled to have their said shipments of said goods, wares and merchandise transported by said C. N. O. & T. P. Ry. Co. over its said road Cincinnati, Ohio, to Chattanooga, Tennessee, at freight rates no higher than will yield to said C. N. O. & T. P. Ry. Co. a reasonable return on the fair value of the property which said C. N. O. & T. P. Ry. Co. employ in and devote to the public service and use and for the public convenience;



your orators further show that the value of the property of the L. & N. R. R. Co. and the N. C. & St. L. Ry. employed in and devoted to the public service and use and for the public convenience, and the schedule of rates from Memphis, Tennessee, to Chattanooga, Tennessee, and the schedule of rates from Memphis, Tennessee, to Birmingham, Alabama, and the schedule of rates from the east to Atlanta, Georgia, should not arbitrarily and by mere fiat control the question as to what schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, will yield to said C. N. O. & T. P. Ry. Co. a reasonable return upon the fair value of the property which said C. N. O. & T. P. Ry. Co. employs in and devotes to the public service and use and for the public convenience.

“(51) Your orators further show that under the facts set forth in this Bill of Complaint, the undisputed facts in said case No. 1542, the grounds of complaint in said case No. 1542, findings of fact by said Commission in said case No. 1542, and the things which were complained of in said case No. 1542, and the things which were not complained of in said case No. 1542 as more particularly specified in paragraph (46) of this Bill of Complaint, that said Commission have given no reasons or rules of law why said C. N. O. & T. P. Ry. Co. should not be taken by itself, and no reasons why the property of the parties aggrieved should be taken without due process of law and why the private property of the parties aggrieved should be taken for public use without just compensation.

*“Your orators further show that in view of the uncontradicted fact that said 60 cent schedule of rates would make more than due returns to said C. N. O. & T. P. Ry. Co., to-wit, 40.66 per cent. per annum, on the value of its property devoted to and employed in the public service and use*



*and for the public convenience, that said Commission in violation of the limitations placed upon the exercise of its power, has required all shippers, including the parties aggrieved, to pay excessive freight rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the Cincinnati Southern merely for the purpose of enabling some other road to make profits, and to enable some other road to maintain branches and to enable some other road to diffuse population and industries.*

“(52) Your orators further show that in said case No. 1542 complaint was made to said Commission that said 76 cent schedule of rates from Cincinnati, Ohio, to Chattanooga maintained by said Cincinnati Southern Railway a single trunk line with two termini and without branches, was unjust and unreasonable in and of itself; that two questions were thereby presented to said Commission, the first whether said 76 cent schedule of rates complained of produced an undue profit on the value of the property devoted to and employed in the public service and use and for the public convenience; and the second for said Commission to substitute for, in lieu of and in place of said 76 cent schedule of rates a new schedule of rates that would return to said C. N. O. & T. P. Ry. Co. so operating said single trunk line without branches between said two termini a fair and reasonable profit upon the value of its property devoted to and employed in the public service and use and for the public convenience and not in excess thereof.

“Your orators further show that the correct rules of law as applicable thereto were as follows:

“(a) That where a schedule of rates between two termini of a single trunk line without branches yields to the Railway Company operating said single trunk line without

branches, excessive net profits on the value of its property devoted to and employed in the public service and use, and for the public convenience, that such schedule of rates is unjust and unreasonable in and of itself, and that the enforcement of such rates to the amount of said excess is the taking of property without due process of law and the taking of private property for the public use without just compensation; and on complaint filed with the Interstate Commerce Commission it is the duty of said Commission to apply said rule of law.

“(b) That where such complaint has been sustained by the Interstate Commerce Commission that a schedule of rates between the two termini of a single trunk line without branches is unjust and unreasonable in and of itself and returns an excessive net profit on the value of the property devoted to and employed in the public service and use and for the public convenience, it is a rule of law that the Interstate Commerce Commission shall prescribe a new schedule of rates which will yield a fair net profit to the Railway Company operating said trunk line with two termini without branches, upon the fair value of its property devoted to and employed in the public service and use and for the public convenience and not in excess thereof.

“(c) That said Interstate Commerce Commission in prescribing such new schedule of rates is without power, and acts beyond the limitations upon its powers if it prescribes a new schedule of rates which will yield to said Railway Company operating said single trunk line with two termini without branches a profit in excess of a reasonable net profit on the fair value of the property devoted to and employed in the public service and use, and for the public convenience; and said Commission is without power in prescribing such new schedule of rates which will yield the

said Railway Company operating a single trunk line with two termini without branches a profit in excess of a reasonable net profit on the fair value of the property devoted to and employed in the public service and use and for the public convenience and has no power so to do on the grounds that said Commission will thereby enable some other road to make profits and to enable some other road to maintain branches and to enable some other road to diffuse population and industries.

“(d) That said Interstate Commerce Commission in determining what new schedule of rates will produce a reasonable net profit to the complained-of Railway Company operating a single trunk line with two termini without branches on the fair value of the property devoted to and employed in the public service and use and for the public convenience, may consider as evidenciary facts bearing thereon schedules of rates on other roads operated under substantially similar circumstances and conditions, but said schedules of rates on said other roads are merely evidenciary facts, and are not to be given controlling and decisive influence, and such schedules of rates on such other roads are not to be prescribed for the complained of Railway Company for the purpose of enabling such other roads to make profits or to enable such other roads to maintain branches or to enable such other roads to diffuse population and industries.

“(53) Your orators further show that said Commission failed and refused to apply said rules of law and on the contrary in determining what would be a schedule of rates for said C. N. O. & T. P. Ry. Co. between said two termini of said Cincinnati Southern Railway, a single trunk line without branches, fixed rates to make profits for said L. & N. R. R. Co. and said N. C. & St. L. Ry. and to

*enable them and each of them to maintain branch lines and to enable them and each of them to diffuse population and industries."*

The status of the L. & N. R. R. Co. is well expressed in the opinion of *Mr. Commissioner Clements* in which *Mr. Commissioner Lane* joined concurring that the 76 cent schedule of rates was unjust and unreasonable and dissenting on substituting a mere 70 cent schedule of rates as follows (Bill of Complaint, paragraph 64; Record Case No. 774, 49-50,) to-wit:

*"The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Deatur division \$25,227.72, and the Cincinnati to Louisville division \$24,618.15. The average of the whole system was lowered by numerous unprofitable branch lines, one of which earned only \$718.48. The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system. To a certain extent this is true, but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.*

*"The gross earnings of the Nashville, Chattanooga & St. Louis in that year averaged \$9,882 per mile and the earnings of its main line from Hickman, Ky., to Chattanooga were \$20,295 per mile."*

The Commission did find the 60 cent schedule of rates to be a just and reasonable schedule of maximum rates and that any schedule above said 60 cent schedule would be an unreasonable schedule of maximum rates and that the

majority of the Commission deliberately established an unreasonable schedule of maximum rates when it adopted the 70 cent schedule of maximum rates instead of the 60 cent maximum schedule of rates is clearly elucidated by *Mr. Commissioner Clements* in which *Mr. Commissioner Lane* joined (Bill of Complaint, paragraph 64; Record Case No. 774, pp. 50-51) as follows, to-wit:

"It is stated in the report that--

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established *their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.*'

*"Plainly then some very substantial reasons should be advanced for denying the relief asked for, bearing in mind, of course, the general conditions in this territory and having due regard for the interests of other routes. This suggestion in my opinion is not met by apprehension of injustice to the Louisville & Nashville and Nashville, Chattanooga & St. Louis, whose financial condition is not shown to require less remedial action, or by the reasoning by which it is sought to show that the middle west magnifies its troubles or by which the eastern carriers are absolved from all responsibility for the existing conditions. \* \* \**

"As already stated, the present rates from Cincinnati to Chattanooga have been in effect for twenty-eight years, although Nashville, Atlanta, and other southeastern points have had relief, more or less justified in theory and in the degree, extended in the different cases. Reductions to Chat-

tanooga have been made from the east and in conjunction with one of the defendants in this proceedings. Looking to the history of the rates from these sections there is no doubt that as to Chattanooga from the west something is radically wrong, and in disposing of the complaint adequate relief should be given. I do not believe this would result in a wholesale disturbance of just rates to points throughout the south. So far as it would aid in the correction of unjust rates to other places the result is not to be deplored. *Judged by any one of the consideration recognized either by the Commission or the courts in determining the reasonableness of transportation charges, the rates complained of exceed the limit of reasonableness to a greater extent than is declared in the report and should be dealt with accordingly.*

"I am authorized by Commissioner Lane to state that he concurs in these views." (18 I. C. C. R. 467-477.)

Attention is called to the fact that there was no evidence in case No. 1542 to show or tending to show, or facts within the cognizance of the Commission, nor did the Commission in its report in said case make any finding that had the C. N. O. & T. P. Ry. Co. been ordered to establish and maintain said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, as a maximum schedule of rates, and had other carriers correspondingly lowered their rates, that such carriers would have earned less than a reasonable return upon the fair value of their property which said other carriers might employ in and devote to the public service and use and for the public convenience (Bill of Complaint, paragraph 54-a; Record Case No. 774, pp. 35-36).

Stripped of superfluous language and verbiage and *taking up the nature and character of the order* made by the Commission, the same is in *substance* as follows:

(1) The Commission distinctly held that the 60 cent schedule of rates was a just and reasonable maximum schedule of rates.

(2) The Commission deliberately substituted a 70 cent schedule of rates as a maximum schedule of rates, which 70 cent schedule of rates is confessedly an unreasonable schedule of rates.

(3) The professed purpose of the Commission in substituting the unreasonable 70 cent schedule of rates in lieu of a 60 cent schedule of rates found to be reasonable by the Commission was the maintenance of branch lines and the diffusion of population and industries along the 4,365.2 miles of The L. & N. R. Co. in the eleven (11) states of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina, and the 1,230.05 miles of the N. C. & St. L. Ry. Co. through the four states of Kentucky, Tennessee, Alabama and Georgia, or 5,595.25 miles of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. scattered through eleven (11) states.

(e) *The Finding of the Commission depriving the shippers of the 60 cent schedule of rates for the purpose of maintaining branch lines on the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. and diffusing industries and population along the main and branch lines of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. was to arbitrarily deprive the shippers of their property and to take their property without compensation.*



One of the distinct issues in the case was that the shippers from Cincinnati, Ohio, to Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. were charged an extortionate schedule of rates (Bill of Complaint, page 4, paragraph 8). The Commission in the course of its opinion said, among other things, that "The chief contention of the complainants is that these charges are extortionate in view of the circumstances under which the service is rendered." (Bill of Complaint, paragraph 31, sub-paragraph a; Record Case No. 774, p. 12.)

Moneys which shippers are required to pay the C. N. O. & T. P. Ry. Co. under said 70 cent schedule of rates over the road of said C. N. O. & T. P. Ry. Co. for all shipments of goods, wares and merchandise under said respective classes from the City of Cincinnati to the City of Chattanooga is property and private property within the meaning of the Fifth Amendment to the Constitution of the United States (Bill of Complaint, paragraph 35; Record Case No. 774, p. 17).

The Commission found that a 60 cent schedule of rates was a just and reasonable schedule of rates but proceeded to take away the 60 cent schedule of rates and substituted therefor a 70 cent schedule of rates so as to enable the L. & N. R. R. Co. to maintain 4,365.2 miles in eleven (11) states of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina and the N. C. & St. L. Ry. Co. 1,230.05 miles in the four (4) states of Kentucky, Tennessee, Alabama and Georgia, and to enable said L. & N. R. R. Co. to maintain branch lines whether profitable or unprofitable and to diffuse population and industries thousands of miles removed from the competitive territory between Cin-



cinnati, Ohio and Chattanooga, Tennessee (this brief, pp. 12-36).

The effect of the order of the Commission in substituting a 70 cent schedule of rates instead of a 60 cent schedule of rates was to license, authorize and empower the C. N. O. & T. P. Ry. Co. to arbitrarily and unlawfully take the private property of the shippers and to transfer its ownership to the ownership and into the treasury of the C. N. O. & T. P. Ry. Co. to the amount and extent of the difference between said 60 cent schedule of rates and said 70 cent schedule of rates in cents per hundred pounds as follows (Bill of Complaint, paragraph 36; Record Case No. 774, pp. 17-19) to-wit:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Amount Confiscated in Cents per</i>						
<i>Hundred Pounds</i> .....	10	6	13	14	14	7

There was no pretense in this order of confiscation that the amount so confiscated was needed by the C. N. O. & T. P. Ry. Co. but it was confiscated so as to enable the L. & N. R. R. Co. with its 4,365.2 miles in Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina, and said N. C. & St. L. Ry. Co. with its 1,230.05 miles of road main line and branches in the states of Kentucky, Tennessee, Alabama and Georgia to maintain branch lines and to diffuse population and industries in territories thousands of miles beyond competitive conditions between Cincinnati, Ohio, and Chattanooga, Tennessee.

The effect of the order was to license the C. N. O. & T. P. Ry. Co. to levy and collect taxes and tributes and to confiscate said amounts and to enforce and collect such contributions from said shippers for the use and benefit

of said C. N. O. & T. P. Ry. Co. and its stockholders although it was conceded and found by the Commission that the C. N. O. & T. P. Ry. Co. and its stockholders were not entitled to the same (Bill of Complaint paragraph 36; Record Case No. 774, pp. 17-19).

It was thereby found by the Commission that this difference in cents per hundred pounds as follows, to-wit:

<i>Classes.....</i>	1	2	3	4	5	6
<i>Extortion in Cents Per</i>						
<i>Hundred Pounds.....</i>	10	6	13	14	14	7

was not for the purpose of compensating the C. N. O. & T. P. Ry. Co. for its services and making a fair return to its stockholders, but solely for the purpose as aforesaid in reference to the maintenance of branch lines and the diffusing of population and industries along the 4,365.2 miles of the L. & N. R. R. Co. scattered over eleven (11) states of the Union, and the 1,230.05 miles of the N. C. & St. L. Ry. Co. scattered over four states of the Union (Bill of Complaint p. 23, paragraph 37). These amounts were not exacted for transportation services but avowedly authorized to be levied for the purposes mentioned (Bill of Complaint, paragraph 37; Record Case No. 774, p. 19).

**(f) Finding of Commission that 60 cent schedule of rates was a reasonable maximum schedule of rates annulled because of claim of vested rights in unreasonable schedule of rates; because Cincinnati was not entitled to its natural advantages; because of other rate adjustments.**

The Commission found that the 60 cent schedule of rates was a just and reasonable schedule of rates and then proceeded to take away said 60 cent schedule of rates and substitute therefor the unreasonable 70 cent schedule of rates because the rate from Cincinnati to Chattanooga and

the rate from Louisville to Chattanooga had been substantially the same for twenty-eight (28) years (Bill of Complaint paragraph 54, sub-paragraph a; Record Case No. 774, pp. 35-36); because Cincinnati was not entitled to its natural advantages from the existence and location of the Cincinnati Southern Railway, a single trunk line with two termini and no branches, extending from Cincinnati, Ohio to Chattanooga, Tennessee, a distance of 336 miles (Bill of Complaint, paragraph 54, sub-paragraph a; Record Case No. 774, pp. 35-36); and because it might be necessary to reduce rates of the carriers from other points although there were no facts in the record in case No. 1542 to show or tending to show that such other roads under such schedules would not earn a fair return on the value of their property devoted to and employed in the public service and use and for the public convenience (Bill of Complaint, paragraph 54, sub-paragraph b; Record Case No. 774, pp. 36-37).

The L. & N. R. R. Co. with its 4,365.2 miles of track made up the main line and branches extending over the eleven (11) states of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina (Bill of Complaint, paragraph 39; Record 774, pp. 20-22) and the N. C. & St. L. Ry. Co. with its 1,230.05 miles of track, made up of main line and branches through the four states of Kentucky, Tennessee, Alabama and Georgia (Bill of Complaint, paragraph 40; Record Case No. 774, p. 23) are operated under circumstances and conditions entirely different and dissimilar to those under which the C. N. O. & T. P. Ry. Co. operates the Cincinnati Southern Railroad (Bill of Complaint, paragraph 54-b; Record Case No. 774, pp. 36-37). This is apparent at a glance by an examination of the Bill

of Complaint, (Record Case No. 774, pp. 20-23), both inclusive), and an examination of the map attached to the Bill of Complaint (marked Exhibit "B") in Case No. 773, p. 95 and stipulated into Case No. 774, p. 90 and copy attached to this Brief as Exhibit B.

Stripped of superfluous language and verbiage *and taking up the nature and character of the order* made by the Commission, the same is in *substance* as follows:

(1) The Commission distinctly held that the 60 cent schedule of rates was a just and reasonable maximum schedule of rates.

(2) The Commission deliberately substituted the 70 cent schedule of rates as a maximum schedule of rates, which 70 cent schedule of rates is confessedly an unreasonable schedule of rates.

(3) The professed purpose of the Commission in substituting the unreasonable 70 cent schedule of rates in lieu of the 60 cent schedule of rates found to be reasonable by the Commission was because the Commission held that there was a vested right in an unreasonable schedule of rates; that Cincinnati was not entitled to its natural advantage as a terminus of the Cincinnati Southern Railway, a single track trunk line without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, a distance of 336 miles; and that to substitute a reasonable schedule of rates was to disturb the relation of rates at distant points on 5,595.25 miles of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. scattered main line and branches through eleven (11) states.

(g) **Bill of Complaint states the whole case.**

The Bill of Complaint alleges (Bill of Complaint, paragraph 29; Record Case No. 774, pp. 11-12) as follows:

"That said Complaint No. 1542 as aforesaid was duly investigated by said Commission upon the pleadings and the evidence and the case of complainant as set forth in paragraph (5) to (27) both inclusive, of this Bill of Complaint and that on said investigation *the facts set forth in paragraphs (5) to (27) both inclusive, of this bill of complaint were conceded and undisputed and said case was duly made out and established.*"

The Commission in its report said (Bill of Complaint, paragraph 31 Sub-par. (i); Record Case No. 774, p. 16), as follows, to-wit:

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to the cost of construction, cost of maintenance and profit upon the investment, **we think the complainants have established their case** *and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.*"

The Bill of Complaint contains the following allegation (Bill of Complaint, paragraph 54 (a); Record Case No. 774, pp. 35-36) to-wit:

"(54a) Your orators further show that there was *no evidence in said case No. 1542 to show or tending to show, or facts within the cognizance of said Commission, nor did the Commission in its report in said case make any finding,* that had the C. N. O. & T. P. Ry. Co. been ordered to establish and maintain said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910 and because

thereof other carriers correspondingly lowered their rates as conjectured by the Commission, that the said conjectured lower rates would have yielded said other carriers less than a reasonable return upon the fair value of the property which said other carriers employ in and devote to the public service and use and for the public convenience."

The Bill of Complaint contains the following allegation (Bill of Complaint, paragraph 62; Record Case No. 774, pp. 46-47) to-wit:

"(62) Your orators further show that said Commission in its said report, findings, conclusions, order and requirement in said case No. 1542, *wholly failed and omitted to find* that said ordered 70 cent schedule of rates was a just schedule of rates, or that said 70 cent schedule of rates was a reasonable schedule of rates, or that said 70 cent schedule of rates was a just and reasonable schedule of rates."

The Bill of Complaint contains the following allegation (Bill of Complaint, paragraph 64; Record Case No. 774, p. 47) as follows, to-wit:

"(64) Your orators further show that the facts set forth below, in the concurring opinion of Commissioner Clements, in which Commissioner Lane<sup>8</sup> joined, were undisputed and admitted facts in said case No. 1542, and that the rules of law laid down by said Commissioner Clements as set forth below in said concurring opinion were sound rules of law applicable to said case No. 1542, and that said commission in its said report which was made a part of the order in said case No. 1542, arbitrarily, oppressively, unlawfully, unjustly and unconstitutionally ignored said facts and laid down rules of law contrary thereto and thereby deprived the said parties aggrieved of their property and

just rights and of the full and adequate relief and remedy to which complainants and the parties aggrieved were and are entitled.

"Your orators further show that they hereby adopt said concurring opinion of said Commissioner Clements as a part of this their Bill of Complaint as bearing on a just and reasonable schedule of rates and as showing to this court the admitted facts and correct rules of law applicable thereto in this case, the same being as follows, to-wit:"

The Bill of Complaint also contains the following allegation (Bill of Complaint, paragraph 66; Record Case No. 774, p. 51) to-wit:

"(66) Your orators further show that *the facts alleged in this Bill of Complaint are all the material facts showing that said 76 cent schedule of rates was unjust and unreasonable; that the facts alleged in this Bill of Complaint are all the material facts showing that said 60 cent schedule of rates would be just and reasonable; that there were no other material facts before said Commission in said case No. 1542 other than those set forth in this Bill of Complaint; that there were no material facts within the cognizance of said Commission in said case No. 1542 except the facts set forth in this Bill of Complaint.*"

#### (h) Summary.

The summary is stated in the Bill of Complaint (Bill of Complaint, paragraph 68; Record Case No. 774, pp. 51-52) as follows:

"(68) Your orators further show that said order in said case No. 1542 is null and void and of no validity whatsoever, and that said Commission was and is without any power or authority in law to make the same or to enforce



the same; and said Commission *exceeded its powers in that behalf*; that said decision and order of said Commission *is contrary to law* and is in violation of the Constitution of the United States, particularly Article 5 of the Amendments to the Constitution of the United States in that the effect of the enforcing of said order is to deprive the parties aggrieved of their property without due process of law, and the taking of private property of the parties aggrieved without just compensation; **that said order and the findings of fact and conclusions thereon which were made part and parcel of said order, all as set forth in Exhibit "A" hereto attached and made part hereof, were based upon such unreasonable exercise of power on the part of said Commission as to be merely within the shadow of the powers conferred on said Commission and to be in direct violation of the substance of the powers conferred on said Commission; that said Commission evaded its duty to give substantial relief to the complainants in said case No. 1542 for its own mere convenience and gave complainants a mere shadow of relief and ignored the measure of justice due complainants; that said Commission acted upon conjectures and applied erroneous rules of law and that said Commission also found some sound rules of law and failed to apply said sound rules of law, and that said Commission acted by mere fiat and acted arbitrarily; that said Commission having before it the fact that said C. N. O. & T. P. Ry. Co. under said 76 schedule of rates was earning 44.43 per cent. per annum on the value of the property employed in and devoted to the public service and use and for the public convenience by arbitrary action, by such unreasonable exercise of its powers, by mere fiat, arbitrarily, unjustly, unlawfully and unconstitutionally**



prescribed a new schedule of rates, to-wit; said 70 cent schedule of rates, which will yield to said C. N. O. & T. P. Ry. Co. 44.18 per cent. per annum on the said value of its said property, and that said reduction was a mere pretense of action on the part of said Commission, and while pretending to give complainants in said case No. 1542 relief *was giving said complainants the mere shadow of relief*, and merely reduced the annual revenue of said C. N. O. & T. P. Ry. Co. by the comparatively trifling sum of \$12,000 a year, being a mere one-fourth of one per cent, per annum on the value of its said property; that said Commission wholly failed to find that said 70 per cent. schedule of rates ordered by said Commission was a just and reasonable schedule of rates."

(i) **Prayer.**

The prayer in substance is (Bill of Complaint, pp. 64, to 67; Record Case No. 774, p. 00) that the order of the Commission in case No. 1542 be suspended, set aside, annulled and declared void and of no effect and that complainant have such other and further relief to which they may be entitled.

**PART SECOND.**

**THE COMMERCE COURT DIVIDED BY A VOTE OF  
THREE TO TWO.**

The United States Commerce Court by a vote of three to two, sustained the demurrer to the bill of complaint on the merits, (Record Case 773, page 106; record case 774, page 67). Judges *Carland*, *Hunt* and *Knapp* voted to sustain the demurrer, and Judges *Archbald* and *Mack* dissented (record case 773, page 117; record case 774, page 78).

The Interstate Commerce Commission had divided on this question by a vote of five to two, one of the five being

Judge Knapp then a member of the Interstate Commerce Commission, and one of the three Judges of the Commerce Court voting to sustain the demurrer. Judge Knapp therefore, voted in the Commerce Court to sustain his vote in the Interstate Commerce Commission. This practically left the decision in the Commerce Court on a vote of two Judges to two Judges because Judge Knapp was voting to sustain his vote as a member of the Commission.

In addition to the opinions of the Court being contained in the records in case 773 and 774, October term, 1911, the opinion of the three members of the Commerce Court and the dissenting opinion of two members of the Commerce Court are reported in 188 Federal Reporter, 245-255.

The dissenting opinion of *Judge Archbald* concurred in by *Judge Mack* (188 Federal Reporter 253-255) is as follows:

**“ARCHBALD Judge (dissenting). There can be no serious question as to the conclusion which would have been reached by the Commission had they confined themselves to the determination of what was a just and reasonable rate from Cincinnati to Chattanooga by the Cincinnati Southern, without regard to the effect upon other roads.** This was gone into at length in 1894, and the 60-cent schedule, which is now contended for, sustained. *Freight Bureau v. Cin., N. O. & T. P. R. R.*, 6 Interest. Com. R. 195. But as the law then stood there was no authority in the Commission to fix future rates, and its action was therefore held of no effect. *Inter. Com. Com. v. Cin., N. O. & T. P. R. R.*, 167 U. S. 479, 17 Sup. Ct. 869, 42 L. Ed. 243. But even with the lapse of time and the change of conditions, the issue as is recognized by the Commission is the same, and the same conclusion would confessedly have been reached except as they were influenced by a

regard for necessities of other roads. 'If it is our duty,' says Commissioner Prouty in the report, 'to take this railroad by itself, and to determine the reasonableness of these rates, by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case, and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.' Unfortunately, however, for the complainants, this view did not prevail. It was contended by the railroad company that the rates should be fixed not only with reference to the final results to itself and its own financial necessities, but also with reference to other companies whose rates were necessarily affected thereby; or in other words, that the Commission should establish rates which would be just and reasonable for the whole section of territory in issue, and that if a particular carrier was so situated that it could make a handsome profit it was to be recognized as a piece of good fortune with which the Commission was not to interfere. Adopting this view, which had also been followed in other cases (*In re Proposed Advance in Freight Rates*, 9 Interest. Com. R. 382; *Spokane v. North Pac. R. R.*, 15 Interest. Com. R. 376; *Kindel v. New York, New Haven & Hartford R. R.*, 15 Interest Com. R. 555), it was accordingly held that the reasonableness of the rate between points served by two or more lines could not be determined by reference to that line alone which was shortest and most favorably situated with respect to operation and earnings, and the rate limited thereby; but that the entire situation was to be considered, and a rate fixed which would be reasonable with respect to all the lines directly serving the points involved. That rates for similar distances on other lines similarly conditioned may be referred to, to assist in determining what is fair and reasonable in any

case, is clear. And it is no doubt proper—also to take into account the effect on rates upon freight moving to and from other points beyond those immediately in view. But that, in my judgment, is as far as it is permissible to go. There is no right, as I look at it, to consider the effect of the rate or rates to be established on those of other roads, between the same points, or to maintain such rates at a figure which is necessary to meet the needs of those roads. And so far as the order of the Commission was induced by any such idea, it cannot be sustained.

*"If the Cincinnati Southern was the only line from Cincinnati to Chattanooga the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. And if it was a line that was costly to build, or that could not be economically run, this would operate to increase the rates, and the shipper would have to pay, to correspond. But, on the other hand, if the reverse of this was true, and the road was neither an expensive one to construct, maintain, or run, the shipper would clearly be entitled to the benefit of these conditions and to the lower rates necessarily to ensue. So, also, if this favored road was the first in the field, and other roads had come in after it was built, it certainly would not be contended that with the introduction of new and additional facilities the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well placed. It is not to be thought of that the construction of a second or third road should be made the basis for higher rates. The standard would be that of the original and most favored line. But what difference does it make whether the road which can afford the best rate is the first or the last to be built? It is the condition at the time the rate is fixed that controls. The shipper is entitled to*

*the benefit of any advance in transportation facilities that may be made, and is NOT TO BE TIED DOWN TO THE UNPROGRESSIVE AND OUTDISTANCED PAST. The supposed advantage in competing lines between the same points becomes a DETRIMENT if rates are to be kept up to help the weakest road.*

*"The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build, and the cost of operation and maintenance is high. But its net earnings are nevertheless large, amounting to some 44 per cent. on the capital stock. The route between the same points by way of Louisville & Nashville and the Nashville, Chattanooga & St. Louis roads is a third longer, or 450 miles, and both of these roads have more or less unremunerative branch lines. And yet the Commission have not only put the two routes on an equality, but have even considered the influence of unprofitable branches, which have to be taken care of, fixing a rate which shall be fair for the whole system, and not simply for the immediate section of road which is involved. This, in my judgment, they had no right to do. The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just by the consideration of what some other road, not so favorably situated may need.*

*"The order of the Commission, being based upon mistaken and erroneous grounds, is therefore invalid and should be so declared. Southern Railway v. St. Louis Hay & Grain Co.,*

214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004; *Inter. Com. Com., v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66, 54 L. Ed. 112; *Southern Pacific Railway v. Inter. Com. Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed.----- . And the case should be remanded in consequence to the Commission in order that a rate may be fixed which shall be just and reasonable as respects the respondent carrier, by whom the services are to be performed. This does not take from the Commission the right to say what that rate shall be. Much less does it involve the determination of the rate by the court. It merely disposes of the rate which has been mistakenly made, as preliminary to a new consideration of it by the Commission upon correct and proper grounds. *Cin., N. O. & T. P. R. R. v. Inter. Com. Com.*, 162 U. S. 184, 238, 239, 16 Sup. Ct. 700, 40 L. Ed. 935; *Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004.

"I therefore dissent from the judgment of the court sustaining the demurrer and dismissing the bill.

"MACK, Judge, concurs in the above dissent."

### PART THIRD.

#### ASSIGNMENTS OF ERROR ON APPEAL.

The assignments of error on appeal in case No. 773 and case 774, October 1911, are identical and set forth in the record in case No. 774 (page 83) as follows, to wit:

"First. The court erred in sustaining the demurrer to the bill and dismissing the bill."

"Second. The court erred in not overruling the demurrer to the bill."

"Third. The court erred in sustaining the motion to dismiss the bill.

## **PART FOURTH.**

### **ARGUMENT.**

#### **I.**

### **PARTIES COMPLAINANT AND JURISDICTION IN CASE NO. 773**

Case No. 1542 was filed before The Interstate Commerce Commission April 30, 1908, by The Receivers' & Shippers' Association, a voluntary association in the City of Cincinnati, Ohio, with a membership of over two hundred and fifty (250) individuals, firms, partnerships and corporations including also in its membership,

The Chamber of Commerce,

The Business Men's Club,

The Manufacturer's Club.

The Lumbermen's Club,

The Pork Packers' & Slaughterers' Association,

The Carriage Makers' Club.

The Live Stock Commission Merchants' Association,

The Cincinnati Furniture Exchange,

The Queen City Furniture Club,

The Pine Lumber Dealers' Association,

The Cincinnati Branch National League of Commission

Merchants. (Bill of Complaint in case No. 6641, case No. 5, Commerce Court—case 773 this Court; Record case No. 773, pp. 11-12, paragraph 28).

James J. Hooker and Ezra E. Williamson, respectively President and Secretary of the Receivers' & Shippers' Association filed the Bill of Complaint in case No. 6641, case No. 5, Commerce Court; case No. 773 this court on behalf of themselves and all persons, firms, partnerships, corporations and all mercantile, commercial, industrial and manufacturing associations and societies and members thereof, members of and represented in The Receivers' &



Shippers' Association (Bill of Complaint in case No. 6641, case No. 5, p. 1) against the Interstate Commerce Commission to suspend, set aside, annul and declare void and of no effect the order in case No. 1542 and all other relief to which they might be entitled.

That the Receivers' & Shippers' Association were proper parties complainant and the Commerce Court had jurisdiction in said case No. 6641, case No. 5 Commerce Court and case No. 773 this court was settled by the Circuit Court in the case of *Peavey vs. Union Pacific R. R. Co.* (March 3, 1910), 176 Fed. Rep. 409, wherein Circuit Judge Sanborn said (p. 415) as follows:

"The Interstate Commerce Act authorizes incorporated Boards of Trade and associations of like character to apply to the Commission for relief (24 Stat. 383, Sec. 13), and such corporations and members representing such *associations may likewise apply to the court for relief* from injuries unlawfully inflicted by the Commission."

This was affirmed by the Supreme Court in *Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911), 222 U. S. 42 at p. 49.

## II

### PARTIES COMPLAINANT AND JURISDICTION IN IN CASE NO. 774.

The complainant in case No. 6668, case No. 6 Commerce Court, case No. 774 this court are The Eagle White Lead Company, The Peters Cartridge Company, The Charles Boldt Company, The Overman & Schrader Cordage Company, and Henry Ratterman and Theodore Luth, partners doing business as Ratterman and Luth



Bill of Complaint case No. 668, case No. 6 Commerce Court; Case No. 774 this court, Record case No. 774, pp. 1-2).

It is alleged in the opening paragraph of the Bill of Complaint that the complainants "present this, their Bill of Complaint on behalf of themselves and all persons, firms, partnerships, and corporations whose interests are common, like and similar or substantially similar and who are very numerous and too numerous to bring individual suits without a multiplicity of suits and manifest inconvenience and oppressive delay, and that your orators are sufficient parties to represent all interest adverse to defendants, and that complainants and all others aforesaid on whose behalf this action is brought are hereinafter for brevity called "Parties Aggrieved" (Bill of Complaint, case No. 6668, case No. 6, Commerce Court; Case No. 774 pp. 1-2 this court; Record No. 774).

The Bill of Complaint then alleges (Bill of Complaint, paragraph 3; Record Case No. 774, p. 2) as follows:

"That said parties aggrieved, including complainants and all others as aforesaid on whose behalf this action is brought are directly and immediately aggrieved, affected, damaged and injured by the order hereinafter complained of and are and were at the times herein alleged interested in and affected by the tariffs, rates and classification hereinafter referred to and engaged in various kinds of mercantile, commercial, industrial and manufacturing pursuits in said Hamilton County, State of Ohio, and manufacture and produce goods, wares and merchandise, enumerated in first, second, third, fourth, fifth and sixth classes of the Southern classification of goods, wares and merchandise hereinafter referred to and sell and sold at the times herein alleged

annually large quantities thereof of great value, to-wit: greatly in excess of the value of several hundred thousand dollars, to purchasers located at Chattanooga, Tennessee, and that said goods, wares and merchandise are enumerated in the first, second, third, fourth, fifth and sixth classes of the Southern classification of goods, wares and merchandise hereinafter referred to, which said Southern classification is the classification adopted by defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company (herein abbreviated C. N. O. & T. P. Ry. Co.), and governs and governed at the times herein alleged the classified schedule of rates first to sixth classes both inclusive from Cincinnati, Ohio, to Chattanooga, Tenn., published in the freight tariffs of said C. N. O. & T. P. Ry. Co., and by it duly filed with defendant, The Interstate Commerce Commission.

"That they have invested large sums of money in building up and maintaining their respective lines of business in an amount exceeding the sum of twenty-five million (\$25,000,000) dollars."

The Bill of Complaint further alleges (Bill of Complaint, paragraph 6, Record Case 774, p. 3) as follows, to-wit:

"That said parties aggrieved, including complainants and all others as aforesaid on whose behalf this action is brought ship now and shipped as interstate commerce at all times herein alleged said goods, wares and merchandise enumerated in said first, second, third, fourth, fifth and sixth classes as aforesaid over said road of said C. N. O. & T. P. Ry. Co. from said City of Cincinnati, Ohio, to said City of Chattanooga, Tennessee."

The Bill of Complaint further alleges (Bill of Complaint, paragraph 28; Record Case 774, p. 11) as follows to wit:

"That on the 30th day of April, 1908 said Receivers' & Shippers' Association, a voluntary association in the City of Cincinnati, County of Hamilton and State of Ohio, with a membership of over 250 individuals, firms, partnerships and corporations, *including your orators* and including also in its membership the following business organizations of Cincinnati:

- The Chamber of Commerce,
- The Business Men's Club,
- The Manufacturers' Club,
- The Lumbermen's Club,
- The Pork Packers & Slaughterers' Association,
- The Carriage Makers' Club,
- The Live Stock Commission Merchants' Association,
- The Cincinnati Furniture Exchange,
- The Queen City Furniture Club,
- The Cincinnati Paint Club,
- The Pine Lumber Dealers' Association.

"The Cincinnati Branch National League of Commission Merchants, filed its complaint with said Commission against said C. N. O. & T. P. Ry. Company, complaining that the rates for the service set forth in paragraph (7) herein were unjust and unreasonable and that said Commission should prescribe just and reasonable rates and said complainant was numbered 1542."

The right of the complainants to maintain this suit was likewise sustained in the case of *Peavy vs. Union Pacific R. R. Co.* (March 3, 1910) 176 Fed. Rep. 409. This was affirmed by the Supreme Court of the United States in *Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911,) 222 U. S. 42, at p. 49. The demurrer in that case (page 416) raised two objections to the Bill of Complaint,

one that the complainants were not parties to the proceeding before the Commission, and the other for want of equity. *Circuit Court Judge Sanborn* (pp. 416-417) overruled both objections and held that any person injured by the order might maintain a Bill of Complaint to annul an order and it was not necessary that he should have been a party to the proceedings before the Interstate Commerce Commission. In affirming *Judge Sanborn* the Supreme Court of the United States, through *Mr. Justice Holmes*, said in *Interstate Commerce Commission vs. Diefenbaugh* (Nov. 13, 1911,) 222 U. S. 42, at p. 49:—

“The plaintiffs are affected by the order and it is just that they should have a chance to be heard although not parties before the Commission.”

In the case at bar complainants were members of The Receivers' & Shippers' Association and were therefore complainants before the Interstate Commerce Commission in case No. 1542 if that were necessary.

### III.

#### CASES CONSOLIDATED.

The Commerce Court entered an order on February 15, 1910, consolidating said cases No 773 (Record case 773, p. 102) and No. 774 (Record case 774, p. 60). It will be noticed from the allegations of the Bill of Complaint in case No. 774, that the complainants are members of the Receivers' & Shippers' Association (Bill of Complaint, paragraph 28, Record Case No. 774, p. 11).

#### IV.

### COMMISSION PURPORTED TO ACT WITHIN THE FORM OF ITS POWERS BUT THE POWERS EXERCISED IN SUBSTANCE WERE BEYOND THE POWERS OF THE COMMISSION.

#### (a) The Pleadings.

Complainants in their Bill of Complaint have distinctly pleaded throughout that the Commission acted merely within the form of its power and in substance exercised powers which the Commission did not possess. This is apparent throughout the Bill of Complaint as follows:

"Is without power" (Bill of Complaint, paragraph 52, sub-paragraph c; Record Case No. 774, p. 34).

"Acted beyond its delegated powers and evidenced such unreasonable exercise of its powers as to be substantially without and beyond such powers." (Bill of Complaint, paragraph 54; Record Case No. 774, p. 35).

"Arbitrarily and by mere fiat" (Bill of Complaint, paragraph 54; Record Case No. 774, p. 35).

"Beyond the powers of said Commission" (Bill of Complaint, paragraph 54, sub-paragraph a; Record Case No. 774, p. 35).

"The parties aggrieved should not be deprived of justice because of any inconvenience to the Commission in hearing just complaints" (Bill of Complaint, paragraph 54; Record Case No. 774, p. 40).

"Said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers" (Bill of Complaint, paragraph 55; Record Case No. 774, p. 41).

"Said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers" (Bill of Complaint, paragraph 56; Record Case No. 774, p. 42).

"That it is beyond the power of said Commission and beyond the limitations on the powers of said Commission" (Bill of Complaint, paragraph 58; Record Case No. 774, p. 43).

"Contrary to the provisions of said Act to Regulate Interstate Commerce and the various acts amendatory of and supplemental thereto and of other provisions of other statutes of the United States and is such an unreasonable exercise in such an unreasonable manner of the powers conferred upon said Commission as not to be within the powers of said Commission and not even within the shadow of the powers conferred on said Commission" (Bill of Complaint, paragraph 58; Record Case No. 774, p. 43).

"That said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers, (Bill of Complaint, paragraph 59; Record Case No. 774, p. 44).

"That said Commission thereby acted arbitrarily and merely within the shadow of the powers and duties given to and imposed on said Commission to establish a just and reasonable schedule of rates, but in violation of the substance of said powers and duties given to and imposed on said Commission" (Bill of Complaint, paragraph 59; Record Case No. 774, p. 45).

"That said Commission thereby arbitrarily and by mere fiat and beyond the limitations on its powers" (Bill of Complaint, paragraph 60; Record Case No. 774, p. 45).

"Beyond the powers of said Commission and beyond the limitations on the powers of said Commission" (Bill of Complaint, paragraph 63; Record Case No. 774, p. 47).

"That said order and findings of fact and conclusions thereon which were made a part and parcel of said order, all as set forth in Exhibit "A" hereto attached and made part hereof, were based upon such unreasonable exercise of power on the part of said Commission as to be merely within the shadow of the powers conferred on said Commission and to be in direct violation of the substance of the powers conferred on said Commission" (Bill of Complaint, paragraph 68; Record Case No. 774, pp. 51-52).

"That said Commission acted by mere fiat and acted arbitrarily" (Bill of Complaint, paragraph 68; Record Case No. 774, p. 52).

"By such unreasonable exercise of its powers and by mere fiat" (Bill of Complaint, paragraph 68; Record Case No. 774, p. 52).

That the Commission be required "to keep within the limitations of the delegation of powers to said The Interstate Commerce Commission, and not to exceed the limitations on the powers of said The Interstate Commerce Commission; to act within the delegated powers of said Commission; to act reasonable within the powers delegated to said Commission; to administer the substance of the Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto; not to act within the mere shadow of the powers delegated to said The Interstate Commerce Commission by said Act to Regulate Commerce and all acts amendatory thereof and supplemental thereto" (Bill of Complaint, paragraph 70; Record case No. 774, p. 53).

We have been thus painstaking in setting forth extracts from the Bill of Complaint to show we are attacking the order of the Commission on the distinct ground that the



"Commission purported to act within the form of its powers but the powers exercised in substance were beyond the powers of the Commission" because a reading of the syllabus and the opinion of the majority of the Commerce Court in the case at bar might lead to the impression that the main point in the case at bar was a constitutional one (188 Fed. Rep. 242-253). That such is not the fact clearly appears from these abstracts from the Bill of Complaint, the briefs in the Commerce Court and this brief in this Court and the dissenting opinion of *Judge Archbald*, concurred in by *Judge Mack* in the Commerce Court (188 Fed. Rep. 253-255).

### **(b) The Common Law.**

The nature of a common carrier was set forth with great force by the Supreme Court of the United States in *Olcott vs. Supervisors* (1873) 16 Wall. 678. *Mr. Justice Strong* (at p. 695) said:

"Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public."

It was a rule of common law that a carrier should not exact from a shipper more than a reasonable rate. This was well expressed by *Mr. Justice Brewer* in *Interstate Commerce Commission vs. C. N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, where he says (at page 494) as follows:

"Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates subject to regulations and restrictions, as well as to *that rule which is*



*as old as the existence of common carriers, to-wit, that rates must be reasonable."*

Irrespective of any statute the common law has clearly fixed the definition of a schedule of reasonable rates and the basis upon which the same shall be calculated, as follows:

(1) The basis of all calculations as to the reasonableness of a schedule of rates to be charged by an incorporated common carrier maintaining and operating a railway under legislative sanction must be the fair and reasonable value of the property being used by it for the convenience of the public.

(2) In such calculations the basic fact to be proved is the fair value of the property used for the convenience of the public. Such basic fact is a *factum probandum*.

(3) In proving said *factum probandum*, there shall be taken into consideration all proper evidence—*facta probans*—which would include: (a) the original cost of construction; (b) the amount expended in permanent improvements; (c) amount and market value of its bonds and stocks; (d) the present as compared with the original cost of construction; (e) the probable earning capacity of the property under particular rates; (f) the sum required to meet operating expenses; (g) all other matters logically tending to fix said value.

(4) Such incorporated common carrier maintaining such railway under legislative sanction is entitled to a fair return upon said value, and no more.

The foregoing propositions are fully expounded in *Smyth vs. Ames* (known also as the Nebraska Rate Case) (March 7, 1898) 169 U. S. 466.

In deciding this case, *Mr. Justice Harlan* laid down the following basic principles as to reasonableness of a schedule of rates and basis for calculating same, (at pages 546-547):

"We hold, however, that the *basis of all calculations* as to the *reasonableness of rates* to be charged by a corporation maintaining a highway under legislative sanction *must be the fair value* of the property being used by it for the convenience of the public. *And in order to ascertain that value*, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the *probable* earning capacity of the property under particular rates prescribed by statute, and sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a *fair return upon the value* of that which it employs for the public convenience."

The same definition of a reasonable schedule of rates and the basic principles for its calculation can also be found in the following cases, to-wit:

*Reagan vs. Farmers Loan & Trust Co.* (1893) 154 U. S. 362.  
*St. Louis & San Francisco R. R. Co. vs. Gill* (1895),  
156 U. S. 649.

*Covington & Lexington Turnpike Co. vs. Sanford*, (1896)  
164 U. S. 578.

*San Diego Land & Town Co. vs. National City*, (1889)  
174 U. S. 739.

*Chicago, M. & St. P. Ry. Co. vs. Tompkins*, (1900)  
176 U. S. 167.

*Minneapolis & St. L. Ry. Co. vs. Minnesota*, (1902)  
186 U. S. 257.

*San Diego Land & Town Co. vs. Jasper*, (1903) 189  
U. S. 439.

*Stanislaus Co. vs. San Joaquin C. & I. Co.*, (1904) 192  
U. S. 201.

*Knoxville vs. Water Company*, (1909) 212 U. S. 1.

*Wilcox vs. Consolidated Gas Co.*, (1909) 212 U. S. 19.

*Railroad Commission of Louisiana vs. Cumberland Telephone & Telegraph Co.*, (1909) 212 U. S. 414.

In *Twenty-second Annual Report of the Interstate Commission* (Dec. 24, 1908) (pp. 83 and 84) it is stated:

"The Commission has been called upon to pass judgment upon certain rate cases in which the reasonableness of a general level *or schedule of rates* was brought into question, and for such cases *one of the most important considerations is the amount of profit secured to the investment*. It is not essential to this line of thought to express full agreement with the extreme advocates of valuation whose arguments seem to imply that, if the value of the property is known, a reasonable rate can be determined by mathematical calculation. Many other considerations are involved in the problem, notably the manner in which the rate proposed will affect the industrial development of the country. When, however, all has been said along these lines that may properly be said, it nevertheless remains as a fundamental proposition that the actual investment in an enterprise needed for giving the public adequate transportation facilities is entitled to and should have a reasonable return, **AND NO MORE** than a reasonable return, in the form of a constant profit; and a reasonable schedule of rates is one that will produce such a result."

*In Re Arkansas Rate Cases* (May 3, 1911) 187 Fed. Rep. 290, the fourth proposition on the syllabus is as follows, to-wit:

"The rights of carriers and the public with respect to rates are reciprocal. The carrier is entitled to ask a fair return on the value of its property which it employs for the public convenience, *and the public is entitled to demand that no more* be exacted from it for the use of the public highway than the services rendered are reasonably worth."

While it was a rule of common law that rates should be just and reasonable, as a matter of fact at common law rates were usually unjust and unreasonable and the common law afforded no adequate relief to the shipper. This was clearly summarized in the Cullum report of 1886 (McPherson on Railroad Freight Rates, pp. 399-405) wherein it is particularly pointed out as the thirteenth (13) reason "*inadequate remedies at common law to correct evils.*"

Nothing was decided by the Supreme Court of the United States in *Cotting vs. Godard* (1901) 183 U. S. 79 to conflict with any case theretofore or since then decided by this Court. The sole point involved in the case of *Cotting vs. Godard* was whether the statute fixing the price for services at the Kansas City stockyards was unconstitutional as denying the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States. The conclusion of the Court was concurred in by all the Justices. Three Justices, in what purports to be the opinion of the Court, discussed other matters not involved and six Justices (at p. 114) took distinct pains to point out that the sole question involved was equal protection of the laws. The whole Court refused to decide (at p. 94) whether stockyards were subject to the rate making power

and attention is called to the fact that it was not a case between carrier and shipper. The Court re-affirmed *Smyth vs. Ames*, *supra*; *Reagan vs. Farmers Loan and Trust Co.*, *supra*; *St. Louis & San Francisco Railroad Co. vs. Gill*, *supra*; *Covington & Lexington Turnpike Company vs. Sanford*, *supra*; *San Diego Land & Town Co. vs. National City*, *supra*; and *Chicago M. & St. P. Ry. Co. vs. Tompkins*, *supra*; being all the cases up to that time decided by the Supreme Court of the United States as to a fair return to a carrier.

It will be superfluous to make further comment, because in the case at bar, the Commission actually condemned the 76 cent schedule of rates as unjust and unreasonable and the question in the case at bar is the correct application of the right rule to be applied under the statute in fixing a just and reasonable new schedule of rates (in the place of the condemned schedule) in accordance with the mandate of the statute that the charge for the service rendered or to be rendered shall be just and reasonable by the carrier performing the transportation service.

(c) The Interstate Commerce Act declaratory of the common law as to the basis of reasonable rates and methods of calculating the same, and amendatory of the common law as furnishing a remedy.

Section 1 of the Act to Regulate Commerce of February 4, 1887, as amended June 29, 1906 (Anderson's Index Digest of the Interstate Commerce Laws, p. 4) provides among other things as follows:

"It shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and *just and reasonable rates applicable thereto.*

**"All charges made for any service rendered or to be rendered** in the transportation of passengers or property as aforesaid, or in connection therewith, *shall be just and reasonable*; and *every unjust and unreasonable* charge for **such** service or any part thereof is prohibited and declared to be unlawful."

Section 15 of the Act to Regulate Commerce of February 4, 1887 as amended June 29, 1906 (Anderson's Index Digest of the Interstate Commerce Laws, pp. 41-42) provides as follows:

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Section 13 of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act for the transportation of persons or property as defined in the first section of this Act; or that any regulation or practice whatsoever of said carrier or carriers affecting such rates, are *unjust and unreasonable*, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the *just and reasonable rate or rates*, charge or charges to be thereafter observed in such case as the maximum to be charged."

This same section further provides (Anderson's Index Digest of the Interstate Commerce Laws, p. 43) as follows:

"Whenever the carrier or carriers in obedience to such order of the Commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commis-

sion may after hearing make a supplemental order prescribing the *just and reasonable portion of such joint rate* to be received by each carrier party thereto, which order shall take effect as a part of the original order."

The same section (Anderson's Index Digest of the Interstate Commerce Laws, p. 44) also provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is *just and reasonable*, and the Commission may, after hearing on the complaint, determine what is a *reasonable charge as the maximum* to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

Said Section 15 (Anderson's Index Digest to the Interstate Commerce Laws, p. 45) clearly refers to the power to fix just and reasonable rates as an enumerated power, because said section 15 amended as aforesaid concludes in the following language, to-wit:

"The foregoing *enumeration of powers* shall not exclude any power which the Commission would otherwise have in the making of an order *under the provisions of this Act.*"

Under the Constitution, the people delegated to Congress legislative power to regulate commerce among the states, i. e. Interstate Commerce. Congress has not attempted to re-delegate this full legislative power to the Interstate Commerce Commission. While Congress has not as yet exercised its full power to its full extent to regulate



interstate commerce, it has legislated on many subjects embraced in interstate commerce. It has properly left to the Interstate Commerce Commission as an administrative body to determine the existence of facts bringing the carriers within the rules of law prescribed by the Act to Regulate Interstate Commerce of 1887, and acts amendatory thereof and supplemental thereto. The Act of 1887 provided that rates, i. e. charges for services rendered should be "just and reasonable," and gave the Interstate Commerce Commission power to determine *as a question of fact within the rules of law* whether a prescribed rate was "just and reasonable," and if not, to condemn same. By the Act of 1906 the Interstate Commerce Commission was given power to prescribe a "just and reasonable rate" in lieu of one condemned as unjust and unreasonable.

*Field vs. Clark*, (1892) 143 U. S. 649, *Mr. Justice Harlan* at page 693.

*Butterfield vs. Stranhan*, (1904) 192 U. S. 470, *Mr. Justice White* at page 496-497.

*Union Bridge Co. vs. United States*, (1907) 204 U. S. 364, *Mr. Justice Harlan* at pages 377 to 387.

*St. Louis and I. M. & S. R. R. vs. Taylor*, (1908) 210 U. S. 281, *Mr. Justice Moody* at page 287.

*Honolulu R. T. Co. vs. Hawaii*, (1908) 211 U. S. 282, at p. 291.

*Interstate Commerce Commission vs Stickney*, (1909) 215 U. S. 98.

*Interstate Commerce Commission vs. Illinois Central R. Co.*, (1910) 215 U. S. 452, p. at 470.

*Monongahela Bridge vs. United States*, (1910) 216 U. S. 177.



*So. Pacific Co. vs. Interstate Commerce Commission*  
(popularly known as the Willamette Valley case)  
(February 20, 1911) 219 U. S., 433.

**(d) Both common carrier and shipper concluded by finding of Commission in the exercise of powers delegated to the Commission.**

We cannot make it too clear in the beginning that we concede that both common carrier and shipper are concluded by the finding of the Commission in the exercise of powers delegated to the Commission. We now adopt the argument used by the railroad companies in the recent case before the Supreme Court of the United States of *Southern Pacific Company, vs. Interstate Commerce Commission* (popularly known as the *Willamette Valley Case*) (February 20, 1911), 219 U.S. 433 (at page 442) as follows:

"In the argument at bar the railroad companies [*as in the case at bar, the shippers*] do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject and if it finds the rate complained of is in and of itself unreasonable having regard to the service rendered, to order a desisting from charging such rate, and to fix in a new and reasonable rate to be operative for a period of two years. The companies further do not deny [*as in the case at bar the shippers do not deny*] that where the Commission exercises such authority, its finding is not subject to review by the court. *Interstate Commerce Commission vs. Illinois Central Railroad Co.* 215, U. S. 452. In other words, the argument on behalf of the railroads [*as in the case at bar the argument on behalf of the shippers*] fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute."

**(e) When common carrier and shipper not concluded by findings of Commission.**

The following nine (9) general rules seem to be established by a fair induction from decided federal cases as to when a shipper or carrier is not concluded by the findings of an administrative officer or administrative body:

**(1) When administrative body contravenes any constitutional limitation.**

*Interstate Commerce Commission vs. Illinois Central Railroad Co.* (1910) 215, U. S. 452, Mr. Justice White, at p. 470.

*Peavey vs. Union Pacific R. R. Co.* (1910) 176 Fed. Rep. 409, at p. 418.

**(2) When an administrative body acts arbitrarily.**

*Monongahela Bridge vs. United States* (1910) 216, U. S. 177, at p. 195.

*Garfield vs. Goldsburg*, (1908) 211, U. S. 249.

*Atlantic Coast Line vs. North Carolina Corporation Commission*, (1907) 206, U. S. 1.

**(3) Administrative ruling not within scope of delegated power under which it purports to have been made.**

*Interstate Commerce Commission vs C., R. & P. Ry. Co.*, (1910) 218, U. S. 88, at p. 103.

*Interstate Commerce Commission vs. Illinois Central R. R. Co.*, (1910) 215, U. S. 452; Mr. Justice White at p. 470.

*Interstate Commerce Commission vs. Delaware, Lackawana & Western R. R. Co.*, (1910) 216 U. S. 531, at p. 538.

*Interstate Commerce Commission vs. Northern Pacific R. R. Co.* (1910) 216 U. S. 538, at p. 544.

*Peavey vs. Union Pacific R. R. Co.* (1910) 176 Fed. Rep. 409, at p. 418.

**(4) Administrative ruling in form within delegated power but authority in fact exercised on assumption of power not delegated to administrative body.**

*Interstate Commerce Commission vs. Illinois Central R. R. Co.* (1910) 215 U. S. 452, Mr. Justice White at p. 470.

*Southern Pacific R. R. Co. vs. Interstate Commerce Commission* (popularly known as the Willamette Valley Case) (February 20, 1911,) 219 U. S. 433.

*Peavey vs. Union Pacific R. R. Co.* (1910) 176 Fed. Rep. 409, at p. 418.

**(5) When an administrative body purports to act for laudable and equitable purposes within the form of power but beyond its lower.**

*Ballinger vs. Frost* (1910) 216 U. S. 240, at p. 241.

*Southern Pacific R. R. Co. vs. Interstate Commerce Commission* (popularly known as the Willamette Valley Case) (February 20, 1911) 219 U. S. 433.

*Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911) 222 U. S. 42, Mr. Justice Holmes at p. 46, lines 4-7 from bottom.

**(6) Administrative power exercised and manifested in such an unreasonable manner that administrative ruling within the shadow and not within the substance of the authority given.**

*Interstate Commerce Commission vs. Illinois Central R. R. Co.* (1910) 215 U. S. 452, Mr. Justice White at p. 470.

*Southern Pacific R. R. Co. vs. Interstate Commerce Commission* (popularly known as the Willamette Valley Case) (February 20, 1911) 219 U. S. 433.

*Peavey vs. Union Pacific R. R. Co.* (1910) 176 Fed. Rep. 409 at p. 418.

**(7) Misconception and misapplication of law by an administrative body to conceded or undisputed facts.**

*Stickney vs. Interstate Commerce Commission* (1908) 164 Fed. Rep. 638.

*Interstate Commerce Commission vs. Stickney* (1909) 215 U. S. 98.

*Peavey vs. Union Pacific R. R. Co.* (1910) 176 Fed. Rep. 409 at p. 418.

*Interstate Commerce Commission vs. Dittenbaugh* (Nov. 13, 1911) 222 U. S. 42.

**(8) When ruling of administrative body is for convenience of administrative body so as to avoid investigation and conclusions as to other matters.**

*Interstate Commerce Commission vs. Stickney* (1909) 215 U. S. 98.

**(9) When administrative body acts by mere fiat.**

*Interstate Commerce Commission vs. Northern Pacific Railroad Co.* (1910) 216 U. S. 538 at p. 544.

**(f) Interstate Commerce Commission vs. Illinois Central Railroad Company (January 10, 1910) 215 U. S. 452; Interstate Commerce Commission vs. C. R. I. & Pa. R. R. Co. (May 31, 1910) 218 U. S. 86, and So. Pac. Co. vs Interstate Commerce Commission (Willamette Valley Case) February 20, 1911) 219 U. S. 433 reconciled.**

(1.)

*Interstate Commerce Commission vs Illinois Central Railroad Co.* (January 10, 1910) 215 U. S. 452.

The above entitled case did not involve any question of a just and reasonable rate or a just and reasonable sche-

dule of rates nor any order of the Commission fixing a just and reasonable rate or a just and reasonable schedule of rates.

The carriers (p. 463) in times of car shortage failed to include foreign fuel cars, private fuel cars, and the company's own fuel cars in handling fuel mined by them in the *pro rata* of cars for distribution. It was claimed by the shippers that this resulted in undue preferences and unjust discrimination.

The Commission sustained the complaint and ordered foreign fuel cars, private fuel cars and company fuel cars which hauled fuel mined by the carriers included in the *pro rata* of cars for distribution (p. 465) and the order of the Commission was assailed on the ground (p. 466) that it deprived the owners of the private cars of the use of their own property; that the foreign cars were not a part of the road equipment and interfered with the freedom of contract, and that as to the company's own fuel cars for carrying fuel mined by the company that the company was to be entirely disassociated as a producer of coal from itself as a common carrier.

In a suit by the carriers in the United States Circuit Court to annul the order of the Commission, the Court held the order of the Commission valid as to foreign fuel cars and private fuel cars but annulled the order of the Commission as to the company's own fuel cars in hauling fuel mined by them (p. 468). The Commission appealed to the Supreme Court of the United States (p. 469) and the appeal involved the sole question as to the companies' cars (p. 469 and p. 472). The whole case turned on the question whether under the power lodged in the Interstate Commerce Commission to prevent unjust discrimination and undue preference the carriers should count their own fuel cars in fixing a *pro rata*

distribution of cars in times of car shortage. *Mr. Justice White* answered the query in the affirmative reversed the Circuit Court and affirmed the order of the Commission.

In the course of his opinion *Mr. Justice White* announced rules of law, which have ever since been reaffirmed, under which a shipper or carrier is not bound by a ruling of the Commission as follows (p. 470) to-wit:

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, *even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of autohrity which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.*"

On the foregoing facts *Mr. Justice White* necessarily held that those rules had no application to the facts in the case before him.

(2.)

*Interstate Commerce Commission vs. Chicago, Rock Island & Pacific R. R. Co. (May 31, 1910) 218 U. S. 88.*

This case involved through class rates from the Atlantic Sea Board to Missouri River points. In a general way, the Mississippi River (or a rough line drawn from Chi-

cago to St. Louis) is the western boundary line of Official Classification Territory, and the eastern boundary line of Western Trunk Line Territory. Western Trunk Line Territory may, in a general way, be described as that territory between the Mississippi River (or a rough line drawn from Chicago to St. Louis) on the east and the Missouri River on the west. The Mississippi River is the "breaking" line between the two territories, or in other words, the Mississippi River is the western boundary of railroad lines of Official Classification Territory and the eastern boundary of railroad lines of Western Trunk Line Territory.

There are local rates from the Atlantic Sea Board to the Mississippi River and local rates from the Mississippi River to the Missouri River. The rates from the Sea Board to the Mississippi River for commodities destined beyond the Mississippi River were "proportional" rates or "separately established" rates. The through rates from the Atlantic Sea Board to the Missouri River were made up by adding together the "proportional" or "separately established" rates from the Sea Board to the Mississippi River and the local rates from the Mississippi River to the Missouri River.

The shippers claimed that this through rate should be somewhat less than the "proportional" or "separately established" rate from the Atlantic Sea Board to the Mississippi River plus the local rate from the Mississippi River to Missouri River points.

On complaint filed with the Commission, the Commission sustained the complaint not by reducing the "proportional" or "separately established" rates from the Atlantic Sea Board to the Mississippi River (p. 99) but by denying the right to add thereto the full local rate from the Missis-



issippi River to Missouri River points but that a somewhat less sum should be added.

The carriers filed suit in the United States Circuit Court to annul the order of the Commission, the claim of the carriers being that in reaching its conclusions it had been controlled by the consideration of matters other than of just and reasonable rates. *Circuit Court Judge Grosscup* joined in by *Circuit Court Judge Kohlsaet* sustained the position of the railroads, while *Circuit Court Judge Baker* dissented. The question really turned in the Circuit Court upon the interpretation of the order entered by the Commission.

The Commission took an appeal to the Supreme Court of the United States. The decision of the Supreme Court of the United States reversed the decision of the Circuit Court by a vote of four to three. A careful and critical examination of the opinion of the majority rendered by *Mr. Justice McKenna* and concurred in by *Mr. Justice Harlan*, *Mr. Justice Day* and *Mr. Chief Justice Fuller*, and the dissenting opinion delivered by *Mr. Justice White* and concurred in by *Mr. Justice Holmes* and *Mr. Justice Lurton* discloses absolutely no difference of opinion as to the sound rules of law and both reaffirm what was said by *Mr. Justice White* in *Interstate Commerce Commission vs. Illinois Central R. R. Co.* (January 10, 1910) 215 U. S. 452 at p. 470.

There was no difference of opinion as to what was the law in the case and the sole difference of opinion turned upon the interpretation of the order of the Interstate Commerce Commission is clearly apparent from the dissenting opinion of *Mr. Justice White* concurred in by *Mr. Justice*



*Holmes and Mr. Justice Lurton* as follows (pp. 111-112):  
to-wit:

"The court below enjoined the execution of the order of the Commission because it was of the opinion that that body had exceeded the powers conferred upon it by the act to regulate commerce, since it had based its order upon the assumption that it was its duty under the act to secure a relatively equal share of the volume of interstate commerce to communities and places, and therefore it was its province to alter otherwise legal rates for the purpose of correcting the inequalities which otherwise would arise from the competitive rivalry between sections and places. As, in my opinion, the court below was correct in the view which it took of the order of the Commission, and was right in holding that the power which the order manifested was not conferred by law, I dissent from the judgment of reversal now announced. It does not, however, seem to me necessary that I should do more than state the fact of my dissent for the following reasons: The judgment of reversal is based not upon the ruling that the Commission possessed the authority to make the order if it was based upon the assertion of power upon which the court below found the order must necessarily rest, but exclusively upon the theory that the court below, while rightly holding that the Commission had not the power which it assumed that body had exerted in making the order, had nevertheless mistakenly enjoined the order, because it did not exert, or attempt to exert, the power which the court conceived had been called into play in making it. In other words, although the opinion now announced excludes the authority which the lower court deemed the Commission had exerted by the order in question, it nevertheless maintains the order because of the conclusion that the order was but an exertion by the Com-

mission of its authority on complaint that a rate was unreasonable of itself, to correct such rate by substituting a reasonable rate therefor. Although I am unable to agree with the reasoning by which the Court now gives to the order of the Commission the narrow basis thus stated, *as the solution of that question depends upon the idiosyncrasies of this particular case and involves no principle of general importance*, it seems to me I am called upon to do no more than simply to state my inability to agree."

We therefore have the concurring opinion of seven (7) justices of the Supreme Court of the United States and three (3) judges of the Circuit Court that the rule laid down in *Interstate Commerce Commission vs. Illinois Central Railroad Co.* (January 10, 1910) 215 U. S. 452, is absolutely sound, and counting the judges of the two courts together we have a difference of opinion as to the interpretation of the order of the Interstate Commerce Commission of five (5) to five (5); in other words, five (5) judges consisting of four (4) judges of the Supreme Court of the United States and one (1) judge of the Circuit Court interpreted the order in one way, and five (5) judges, three (3) of whom were members of the Supreme Court of the United States and two (2) of whom were members of the Circuit Court, interpreted the order another way. This case, therefore, so far as the law is concerned decides nothing different from what had been laid down in *Interstate Commerce Commission vs. Illinois Central Railroad Co.* (January 10, 1910) 215 U. S. 452.

(3.)

*Southern Pacific Co. vs. Interstate Commerce Commission* (*Willamette Valley Case*) (February 20, 1911) 219 U. S. 433.

The above entitled case arose as follows (pp.438-439.)

"In November, 1907, a complaint was filed with the Interstate Commerce Commission on behalf of the Western Oregon Lumber Manufacturer's Association and others, concerning a rate of \$5.00 per ton, in carload lots, on 'green common rough fir lath and lumber and forest products,' from Willamette Valley points to San Francisco and bay points, fixed in a tariff filed by the Southern Pacific Company with the Commission and which became operative in April, 1907. It was charged that the rate complained of was unreasonable in and of itself and discriminatory. It was averred that from about 1898 there had existed a rate of \$3.10 for carrying the same character of lumber between the points named; that upon the faith of this rate and the belief that it would not be changed, large amounts of capital had been invested in lumber mills in the Willamette Valley; that the people in that Valley were dependent upon the lumber industry and that such industry would be destroyed and the population be detrimentally affected if the new rate of \$5.00 per ton was continued to be charged. It was alleged that the \$3.10 rate was reasonable in and of itself, and that the rate had been increased without just cause upon the theory that the lumber interest in the Willamette Valley was prosperous, and that hence the traffic could stand the increase. The railroad companies answered, setting up the reasonableness of the \$5.00 rate. They in effect averred that the \$3.10 rate, which had previously prevailed, was unreasonably low and that it had been fixed solely for the purpose of enabling lumber from the Willamette Valley to reach a market in San Francisco and bay points, which it could not have done if a just and reasonable rate had been exacted. This condition, it was alleged, had arisen from the fact that from Portland and other

points on the Columbia River and Puget Sound there was a highly developed lumber industry accessible to San Francisco and bay points by water at rates so low as to have absolutely excluded the shipping of any lumber from the Willamette Valley by rail to such points, unless a very low rate had been fixed by the railroad companies to meet the water-borne lumber traffic, and that there was no market which was commercially available for the Willamette Valley lumber other than that of San Francisco and bay points when the \$3.10 rate was fixed. \* \* \*

"It is certain that for a number of years the \$3.10 rate was applied both to shipments of lumber not only from the Willamette Valley, but also from Portland. Several years, however, before the going into effect of the \$5.00 rate fixed in the tariff of April 1907, a tariff fixing that rate had been made applicable to Portland. During the hearing before the Commission the Portland lumber interests intervened and asked that if the \$3.10 rate was restored to Willamette Valley it should also be restored to Portland so as to prevent discrimination against Portland."

The order entered by the Commission (p. 440,) "directed the railroad to cease from charging the \$5.00 rate complained of from Willamette Valley points and fixed as a proper rate from certain points in the valley the sum of \$3.40 a ton, and from the remaining points in the valley the sum of \$3.65. Although some of the points embraced by the order were within a few miles of Portland, that city was not given the benefit of the reduction, and therefore remained subject to the \$5.00 rate."

From this order *Mr. Commissioner Harlan*, in which *Mr. Chairman Commissioner Knapp* concurred, dissented as follows, (14 I. C. C. R., p. 74) to-wit:

"The \$3.10 rate is conceded to have been a low rate, and *I do not understand that the present rate of \$5.00 is condemned in the opinion of the Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest. In my judgment we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preferences and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the services offered it is reasonable or excessive. This is not the test to which the rate complained of in this proceeding has been subjected as I read the opinion. It is not held to be unlawful on the ground that it is an excessive rate, but is reduced rather because of certain supposed equities existing between the complaining shippers and the defendant carriers. Without enlarging upon this view of the matter it will suffice to say that I do not understand that we are authorized to deal with a rate on these grounds.*"

"For these reasons and also because I consider the present rate not to be an unreasonable rate I am constrained to withhold my assent to the disposition made of the complaint."

"The Chairman of the Commission [Mr. Knapp] authorizes me to say that he joins in this dissent."

The railroad companies filed a suit in the United States Circuit Court to annul the order of the Commission alleging among other things the following (p. 441,) to-wit:

"The Commission in setting aside the increased tariff rate of \$5 and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and

of itself with regard to the service rendered, but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers."

The case was heard upon bill, answer and replication and the evidence introduced before the Commission (at p. 442). The Circuit Court dismissed the bill (at p. 442) "upon the theory that, as the Commission found that the rate fixed by it gave some remuneration above the cost of operation, and was not therefore confiscatory, there was no power to interfere."

An appeal was taken to the Supreme Court of the United States.

*Mr. Chief Justice White* in the opening paragraph of the unanimous opinion of the Supreme Court of the United States said (p. 437) said:

"Whether the court below was right in refusing to enjoin at the suit of the railway companies who are appellants the enforcement of an order of the Interstate Commerce Commission is the general subject for consideration on this record.

"When that which is superfluous is put out of view, it will come to pass that every substantial controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, *what was the power which that body exerted in making the order in question.*"

*Mr. Chief Justice White* states the respective positions of the carriers and the commission (p. 442) as follows:

"In the argument at bar the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject, and if it finds the rate complained of is in and of itself unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix in a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority its finding is not subject to be reviewed by the court. *Interstate Commerce Commission vs. Illinois Central R. R. Co.*, 215 U. S. 452. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by statute. *Making these concessions, the proposition relied upon to secure a reversal is that the court below should have set aside the order of the Commission because that order was in excess of the power conferred upon the Commission, and this, it is insisted, is to be determined by substance, and not mere form. In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that both in form and in substance the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an*



*unjust and an unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate.* That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied *that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered.* On the other hand the Commission in the argument at bar does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of, a power which if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate prevailing in the Willamette Valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things, it is insisted, were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to



forbid an unjust and unreasonable rate and fix a reasonable one.

"It is clear, therefore, as we have said at the outset that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is, *What was the nature and character of the order made by the Commission? That is, what, in substance, was the power which the Commission exerted in making the order.*

"Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests. We proceed very briefly to state the reasons which compel us to this conclusion. In the first place, when the complaint which was made to the Commission and the answer of the railroad companies to that complaint are considered they give rise to the inference *that in substance the subject complained of was not the intrinsic unreasonableness of the new rate which the railroad companies substituted for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, and injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting a higher rate, even if that rate was in and of itself reasonable and just. That such was the view entertained by the complainants when the hearing began before the Commission is too clear to require anything but statement."*

Mr. Chief Justice White then quotes from the dialogue which took place between Mr. Teal, who was counsel for the

be considered in the ultimate exertion of the lawful power to shippers, and *Mr. Commissioner Prouty* who was one of the Commissioners hearing the case (at. pp. 445-447) as follows:

*"Commissioner Prouty:* Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is \$5 a ton, would you claim that this Commission to-day ought to raise that rate?

*"Mr. Teal:* No; I don't think I would.

*"Commissioner Prouty:* That is to say, you do not claim the rate is unreasonable in itself?

*"Mr. Teal:* No; I do not.

*"Commissioner Prouty:* You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley, and that the industry cannot exist there in competition with other sections unless that rate is maintained in effect?

*"Mr. Teal:* Yes, sir.

*"Commissioner Prouty:* And therefore the railroad is obliged to maintain it in effect?

*"Mr. Teal:* It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

*"Commissioner Prouty:* That simply shows that it has been maintained and industries have grown up; that the railroad company has, during that period, elected to maintain it, and found it profitable, probably.?

*"Mr. Teal:* You have stated my position exactly. I am not here complaining about the rates being high or low, because it is a low rate."

"Thereafter, as Mr. Teal concluded his opening statement, the following occurred:

"*Commissioner Prouty*: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, because you say the rate is low enough, unless those men have been induced to build their mills there, and ought to be protected.

"*Mr. Teal*: That is correct. I want you to understand, Mr. Commissioner, that I do not claim the Commission has a right to compel the railroad, under ordinary circumstances, to meet water rates or any other competition."

*Mr. Chief Justice White* said (p. 449) as follows:

"Although we find the record replete with statements made during the course of the hearing by counsel for both parties, and certainly by one or more of the Commissioners who were present at the hearing, which we think leave no doubt as to the nature and character of the power exerted, we do not pursue the subject further, since we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. *While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise*

*from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the chairman of the Commission, dissented on the ground that the order was an exertion of a power not possesssd to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate the contrary. The obvious impression as to the nature and character of the power exerted given by the very face of the opinion of the Commission is shown by the syllabi to the official report of the opinion which we copy in the margin.*

“Finally the express exclusion of Portland from the benefit of the reduced rate and the reasons given for the exclusion indubitably establish the character of the power exerted so as to exclude the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate. We say this because if the assumption be indulged in that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding Portland from the benefit of the reduced rate. We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory character. And the reasons given for the exclusion of Portland from the benefit of the reduction which the order made likewise leave no room for the conclusion

that the reduction was based merely upon the finding that the tariff rate which was reduced was, considering the service rendered, in and of itself unreasonable. The reasons for not applying the reduced rate to Portland were thus explained in the report of the Commission:

“ ‘The considerations which induce us to apply this lower rate to mills in the Willamette Valley do not obtain in case of Portland. These manufacturers have the benefit of the water rate, and are not, therefore, dependent at all upon the defendants for reaching San Francisco market. The low rate was only applied to Portland for a comparatively short time, and has not been in force there for the last four years. It is of no special importance to the manufacturer at that point, and no injustice is done by withdrawing it. The distance from Portland is considerably greater than the average distance from Willamette Valley mills, and, on the whole, we think the defendants should be left to their option in meeting or declining to meet water rates at Portland. The claim of the intervenors is therefore denied.’

“Treating the order as having been based upon the assumed possession of the extraordinary power which it is insisted was exercised in making the order, the force of the reasoning thus advanced to sustain the order cannot be successfully gainsaid. But upon the theory that the order was made merely as the result of the exercise of the statutory power to prevent the charging of an unreasonable and unjust rate, having regard to the service rendered, the inconsequence of the reasoning stated becomes at once patent. This must be the case, because Portland had been deprived by the railroads of a just and reasonable rate for a longer time than the Willamette Valley points certainly afforded no ground for concluding that Portland was not entitled to

relief, and it is equally certain that the fact that there was competition by water from Portland can in no way justify the permitting the railroads to continue to charge against traffic from Portland a high and unreasonable rate. Indeed if the order be assumed to have been made merely as the result of the power to correct an unjust and unreasonable rate, then the *reasoning* by which the order, in so far as it dealt with Portland was concerned, was sustained, comes to this, *that the greater the wrong the lesser the right to redress, and the greater the reason for the low and competitive rate the stronger the reason for refusing to fix such a rate.* \* \* \*

"The decree of the Circuit Court is reversed and the case remanded to that court, with directions to enter a decree declaring the order of the Interstate Commerce Commerce Commission to be void, and otherwise granting the relief prayed in the bill."

**(g) Administrative ruling in case at bar in form within delegated power but authority in fact exercised on assumption of power not delegated to Interstate Commerce Commission; Interstate Commerce Commission purported to act for laudable and equitable purpose within the form of power but beyond the powers of the Interstate Commerce Commission;**

(I.)

### **Factum Probandum.**

To determine the questions whether the findings of the Interstate Commerce Commission were within the exercise of the powers delegated to the Interstate Commerce Commission; or whether the ruling of the Interstate Commerce Commission while within the form of its delegated powers were in fact exercised on the assumption of powers

not delegated to the Interstate Commerce Commission; requires the Bill of Complaint in this case be considered from its four corners, all of its allegations being admitted to be true by the demurrers of defendants. It becomes important therefore in the first place to determine the hypothesis upon which the Bill of Complaint proceeds and to carefully distinguish between the proposition to be proved (*factum probandum*) and the evidentiary facts in support thereof (*facta probans*).

As has been pointed out in the statement of the case (this brief, p. 4) the C. N. O. & T. P. Ry. Co. maintained a schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, in cents per hundred pounds as follows:

Classes.....	1	2	3	4	5	6
Cents Per Hundred Pounds.....	76	65	57	47	40	30

The foregoing schedule of rates will be called the "76 cent schedule" of rates for brevity.

This "schedule of rates" was a "schedule of rates" maintained by the C. N. O. & T. P. Ry. Co. for the shipment of class goods, wares and merchandise from the City of Cincinnati, Ohio to the City of Chattanooga, Tennessee, a single track railway without branches a distance of 336 miles (this brief, statement of case, p. 3). It will therefore be noticed that the problem involved in this case is a "schedule of rates" and not an individual rate on an individual commodity. It is also to be borne in mind that the complaint made before the Interstate Commerce Commission and the evidence in support thereof pertain exclusively to an attack upon this "schedule of rates" (Bill of Complaint, pp. 5-14, paragraphs 5-27, both inclusive).

Attention is called to paragraph 29 of the Bill of



Complaint; (Record Case No. 774, pp. 11-12) as follows, to-wit:

“(29). That said Complaint No. 1542 as aforesaid was duly investigated by said Commission upon the pleadings and the evidence and *the case of complainant* was as set forth in paragraphs (5) to (27) both inclusive of this Bill of Complaint and that on said investigation *the facts set forth in paragraphs (5) to (27) both inclusive of this Bill of Complaint were conceded and undisputed and said case was duly made out and established.*”

This much of the Bill of Complaint has already been epitomized (this brief, pp. 3-11). The Commission distinctly found that the issue presented in said case No. 1542 was the unreasonableness of this particular schedule of rates considered in and of itself and that the chief contention of the Receivers' & Shippers' Association was that this schedule of rates was extortionate and that the Commission so found particularly to the question as to the inherent reasonableness of this schedule of rates (Bill of Complaint, paragraph 31, sub-paragraph a; Record Case No. 774, p. 12). This being the case of the Receivers' & Shippers' Association before the Interstate Commerce Commission that body ruled (this brief, p. 10). “If it is our duty to take this road by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance and profit upon the investment, we think the Complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.”

As already set out the schedule of rates formerly found reasonable by the Interstate Commerce Commission from



Cincinnati, Ohio to Chattanooga, Tennessee, in cents per hundred pounds (this brief, p. 11) were as follows:

Classes.....	1	2	3	4	5	6
Rates Per Hundred Pounds.....	60	54	40	30	24	22

This schedule of rates will be referred to as the "60-cent schedule" of rates for brevity.

In case 1542 before the Commerce Commission (being the matter involved in the case at bar) evidence was offered which clearly supported a case wherein all rates maintained by C. N. O. & T. P. Ry. Co. should have been reduced but the complainants in that proceeding limited their prayer to a reduction of the schedule of rates involving classes. **The C. N. O. & T. P. Ry. Co. has no right to complain merely because the Commission did not reduce all the other rates as it might well have done under the evidence.**

The case made out by the Complainants was that this schedule of rates was unjust and unreasonable and the findings of the Commission is that the complainants established their case.

A distinction is to be made where an attack is made upon a schedule of rates as unjust and unreasonable and where an attack is made upon an individual rate or an individual commodity.

*Beale & Wyman* in *Railroad Rate Regulation*, Section 312, discuss the reasonableness of a schedule of rates as follows:

"The reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair return to the carrier." This is largely a mathematical question. The carrier is entitled, first, to pay all expenses; which

would include both the actual expense of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same."

In the case at bar the Commission has distinctly condemned the 76-cent schedule of rates as unjust and unreasonable. The Commission has distinctly found that taking into question the cost of the property, the cost of maintenance and profit upon the investment that The Receivers' and Shippers' Association had duly established their case and found that the 60-cent schedule of rates was a reasonable schedule of rates. This was the proposition to be proved (the *factum probandum*) and all other circumstances were evidentiary (*facta probans*), (this brief, pp. 93).

Revenue (i. e. receipts, disbursements and net profits) is always an evidential fact, its weight in each instance depending of course whether a whole scheme of rates is involved, a whole schedule of rates is involved, a single class of a schedule of rates is involved, or a single commodity. The Commission had power to consider the revenue of the C. N. O. & T. P. Ry. Co. and this factor might have justified the Commission in reducing the whole scheme of rates. In view of the fact, however, that the complainants before

the Commission asked merely a reduction of a schedule of numbered classes, is no argument against the probative force of the evidence, because upon such evidence the Commission did not reduce all the rates and therefore the C. N. O. & T. P. Ry. Co. would have no right to complain because an injustice was still being done the public as to the rates which were not reduced.

We are not asking this court to find that said 76-cent schedule of rates was unjust and unreasonable because that fact has been duly found by the Interstate Commerce Commission; we are not asking this court to find that a 60-cent schedule of rates would be a just and reasonable schedule of rates because that fact has been found by the Commission (this brief, p. 11).

The Commission in their finding say, "If it is our duty to take this road by itself." This particular schedule of rates on this particular road, to-wit; The C. N. O. & T. P. Ry. Co., was the specific subject under investigation. It was the only schedule of rates before the Commission and it was the only railroad before the Commission and of course it was the duty of the Commission to take that particular road by itself. As a schedule of rates and not an individual rate or an individual commodity was before the Commission it was the duty of the Commission to consider the value or as sometimes expressed, the cost of the road, the cost of maintenance and particularly the profit upon the investment. These are the elements which must be considered in determining what is a just and reasonable schedule of rates (this brief, pp. 62-63).

We cannot make it too clear in the beginning that while we insist that this particular schedule of rates upon this particular railroad should be taken by itself as the proposition to be proved (*factum probandum*), we do not

want to be understood that the Commission cannot consider other carriers and schedules of other carriers competing for the business between Cincinnati and Chattanooga; in other words, schedules of rates covering the question of *transportation or traffic competition*; and we have distinctly set forth this concession in the four rules of law inserted in our Bill of Complaint (paragraph 52; Record case No. 774, pp. 34-35) and repeated in our statement of the Case in this brief (p. 33). One of these rules as directly bearing thereon is now repeated for convenience as follows:

"That said Interstate Commerce Commission in determining what new schedule of rates will produce a reasonable net profit to the complained of railroad company operating a single track line with two termini without branches on the fair value of the property devoted to and employed in the public service and use and for the public convenience, *may consider as evidentiary facts bearing thereon schedules of rates on other roads operating under substantially similar circumstances and conditions, but said schedule of rates on said other roads are merely evidentiary facts and are not to be given controlling and decisive influence, and said schedules of rates on said other roads are not to be prescribed for the complained of railroad company for the purpose of enabling such other roads to make profits or to enable such other roads to maintain branches or to enable such other roads to diffuse population and industries.*"

(2.)

### **Transportation or Traffic Competition.**

As we have seen, the proposition to be proved (*factum probandum*) was a schedule of just and reasonable rates between the City of Cincinnati, Ohio, and the City of Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. a

single track line without branches 336 miles long. The Commission having conclusively found that a 76-cent schedule of rates was unjust and unreasonable considering the value of the property devoted to the public service, the cost and expense of operating the property, the net profit or net return on the investment; it then devolved upon the Interstate Commerce Commission to substitute in lieu thereof a new schedule of rates which would be just and reasonable. The four rules to govern the Commission in such cases were set out in the Bill of Complaint (Bill of Complaint, paragraph 52; Record Case No. 774, pp. 34-35) and repeated in the statement of the case in this brief (this brief, pp. 31-3).

There is of course a certain volume of traffic to be moved from the City of Cincinnati to the City of Chattanooga which could go either by the C. N. O. & T. P. Ry. Co., a distance of 336 miles from Cincinnati, Ohio, to Chattanooga, Tennessee, or could go from Cincinnati, Ohio, to Chattanooga, Tennessee by way of the L. & N. R. R. and N. C. & St. L. R. R., a distance of 450.9 miles, being 114 miles from Cincinnati to Louisville over the L. & N. R. R. Co., a distance of 185.9 miles from Louisville to Nashville over the L. & N. R. R. Co and a distance of 151 miles from Nashville to Chattanooga over the N. C. & St. L. Ry. Co.

If this volume of traffic should move from Cincinnati to Chattanooga over the C. N. O. & T. P. Ry. Co. the direct haul would be 336 miles, and if this volume of traffic should move from Cincinnati to Chattanooga over the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. by way of Louisville and Nashville, the haul would be 450.9 miles, or 114.9 miles longer. In other words, the haul by way of the C. N. O. & T. P. Ry. Co. would be 114.9 miles shorter than the

haul by the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co., while the haul from Cincinnati to Chattanooga over the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. would be 114.9 miles longer than over the C. N. O. & T. P. Ry. Co.; or as stated in another form, the haul from Cincinnati to Chattanooga by way of the C. N. O. & T. P. Ry. Co. is about 25 per cent less than the haul to Chattanooga by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co., and the haul from Cincinnati to Chattanooga by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. is about 33 per cent greater than the haul over the C. N. O. & T. P. Ry. Co. (this brief, pp. 13-15).

This volume of traffic therefore would move either over one line or the other or would be divided between two lines. It will be conceded that up to the respective capacities of the roads that the road which had that lesser rate would get the greater bulk of the traffic.

Taking the gross earnings of each of these roads between Cincinnati, Ohio, and Chattanooga, Tennessee, the gross earnings for the 336 miles of the C. N. O. & T. P. Ry. Co. would be \$8,763,773.76, and the gross earnings for the 450.9 miles of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. would be \$11,540,064.06. Taking a mile as the unit for gross earnings it appears that the average gross earnings per mile of the 336 miles of the C. N. O. & T. P. Ry. Co. is \$26,082.66, and taking a mile as the unit for gross earnings it appears that the average gross earnings per mile of the 450.9 miles of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. is \$25,593.40 (this brief, p. 13). This is set forth in the diagram in the Bill of Complaint (Record Case No. 774, p. 26) and repeated in this brief (p. 15).

Findings to this effect were in substance made by the Commission (this brief, pp. 18-19). The net profits made by the C. N. O. & T. P. Ry. Co. upon the capitalization and value of the property devoted to the public service under the 76-cent schedule of rates amounted to 44.43 per cent per annum (this brief, p. 18-19).

The net profits under the 60-cent schedule of rates on the same tonnage on the capitalization and the value of the property devoted to the public service would have amounted to 40.66 per cent per annum (this brief, p. 8).

The net profits on the same tonnage on the capitalization and value of the property devoted to the public service under the 70-cent schedule of rates would amount to 44.18 per cent. (this brief, p. 8).

The Commission has failed to find or investigate and determine the net profits upon the capitalization and the value of the property devoted to the public service from Cincinnati to Chattanooga by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. It is clear, however, from the facts alleged in the Bill of Complaint which are admitted by the demurrer of the defendant and as found by the Commission that this average of gross earnings over the 450.9 miles from Cincinnati to Chattanooga by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. are dragged down from about \$25,000 a mile to between \$10,000 and \$11,000 a mile over main line and branches of 5,595.25 miles of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. scattered through eleven (11) states of the Union with unprofitable branch lines and branch lines not earning operating expenses and main lines and branches far distant from the transportation and traffic competition between Cincinnati and Chattanooga (this brief, pp. 20-34).



A consideration of the entire L. & N. R. R. Co. mileage, main line and branches, shows a stock dividend in 1881 of 100 per cent and a yearly average of net profits equal to a 10 per cent dividend on common stock (this brief pp. 17-18).

Considering the transportation or traffic competition between the C. N. O. & T. P. Ry. Co. on the one hand between Cincinnati and Chattanooga, and on the other hand the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. between Cincinnati and Chattanooga, the Commission in the majority report states no evidentiary facts as applied to the C. N. O. & T. P. Ry. Co. why the 60-cent schedule of rates should not have been substituted for the 76-cent schedule of rates instead of the 70-cent schedule of rates.

The Interstate Commerce Commission mistook the *factum probandum* for the *factum probans*, and mistook the *factum probans* for the *factum probandum* when a majority of the Commission said (this brief, p. 22). "Now, in adjusting the rates of the Louisville and Nashville or the Nashville, Chattanooga and St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?"

The concrete question to be considered in the case at bar was a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. The fact of competition on the part of a competing carrier by way of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. was a circumstance to be considered in fixing a just and reasonable rate between Cincinnati, Ohio, and Chattanooga, Tennessee, but not for the fixing of a common rate for the whole L. & N. R. R. and the whole N. C. & St. L. R. R., over 90 per cent of whose lines were



serving an entirely different locality under conditions distinctly different from the competition traffic or transportation conditions between Cincinnati, Ohio, and Chattanooga, Tennessee.

What is meant by a majority of the Commission wherein it states, "Shall the Commission consider each section of the road by itself, *or shall it establish a common rate for the whole*" is a little difficult to understand when we keep in mind the question before the Commission. This is not a question of establishing a common rate for the whole L. & N. or the whole N. C. & St. L. but the establishment of a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee.

In *San Diego Land & Town Co. vs Jasper* (1903) 189 U. S. 439, Mr. Justice Holmes said (pp. 446-447):

"If a plant was built, as probably this was, for a larger area than it finds it is able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, *neither justice nor the constitution require that, say two thirds of the contemplated number should pay a full return.*"

This was quoted with approval by the Circuit Court of Appeals of the Ninth Circuit in the case of *Boise City Irrigation and Land Company vs Clark* (1904) 131 Fed Rep. 415 at p. 422.

In *Ames vs Union Pacific R. R. Co.* (1894) 64 Fed. Rep. 165, Mr. Justice Brewer said (p. 188):

"It is, however, urged by the defendants that, in general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining states; and that the reduction by house roll 33 merely estab-

lishes an inequality between Nebraska and the other states through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one state. But not necessarily absolutely as cheap, for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one of great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 percent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of road, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance."

In *Smyth vs Ames*, (1898) 169 U. S. 466, *Mr. Justice Harlan* said (pp. 539-542):

"It is said by the appellants that the local rates established by the Nebraska statute are much larger than in the State of *Iowa*, and that fact shows that the Nebraska rates are reasonable. This contention was met by the circuit court: 'It is, however, urged by the defendants that, in the

general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining states, and that the reduction by House Roll 33 merely establishes an inequality between Nebraska and the other states through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one state, but that are not necessarily bound to give absolutely the same rates to the people of all states; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one of great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 percent higher than similar rates in the State of Iowa. And it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is comparatively little significance, 64 Fed. Rep. 165. In these views we concur, and it is unnecessary to add anything to what was said by the circuit court on this point.

"It is further said, in behalf of the complainants, that the reasonableness of the rates established by the Nebraska

statute is not to be determined by inquiry whether such rates would leave a reasonable net profit for the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all the businesses, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by the railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within the state, to the cost of doing such local business, and to the fair value of the property used in conducting it without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and on all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which

so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business on the ground that it will be able only in that way to meet its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the states can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

In *San Diego Land & Town Co. vs. National City* (1896), 74 Fed. Rep. 29; S. C. (1899) 174 U. S. 739, the water company was supplying a town and also a large agricultural territory outside the town. The question before the court was as to reasonable rates for supplying water to the inhabitants of the town. The Circuit Court held that the town should be separated from the large agricultural territory outside of the town and that a fair return should be estimated on the value of that part of the plant referable to the territory embraced in the town without attempting to make compensation for losses sustained in the agricultural territory outside the town. The

Supreme Court of the United States sustained the holding of the Circuit Court, *Mr. Justice Harlan* (p. 758), saying:

"One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers outside of the city are to be considered in fixing the rate for consumers within the city. In our judgment the Circuit Court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point."

What was said by *Mr. Justice Harlan* is particularly applicable to the situation in the case at bar, because in the case at bar the question is what is a just and reasonable rate from Cincinnati, Ohio, to Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co where the competitor for the traffic is a small fragment of the L. & N. R. R. Co. in connection with a small fragment of the N. C. & St. L. Ry. Co. in the same territory and under substantially the same conditions of income, gross earnings per mile, expenses, etc.

The facts in the case at bar are conceded and have been distinctly found to be true by the Commission. The sound rule of the law is clear. The majority of the Commission was clearly resting under a misconception of the law and mis-applied the law to the conceded and undisputed facts. It has been distinctly held that an order of such an administrative body as the Interstate Commerce Commission will be set aside when the ruling of the Interstate Commerce Commission resulted from a mis-concep-

tion and mis-application of the law to conceded and undisputed facts.

*Stickney vs. Interstate Commerce Commission* (1908) 164 Fed. Rep. 638.

*Interstate Commerce Commission vs. Stickney* (1909) 215 U. S. 98.

*Peavey vs. Union Pacific* (1910) 176 Fed. Rep. 409 at p. 418.

*Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911) 222 U. S. 42.

Keeping in mind the fact that the question before the Commission was the fixing of a schedule of just and reasonable rates between the City of Cincinnati, Ohio, and the City of Chattanooga, Tennessee, it was the duty of the Commission to exercise this power in a just and reasonable manner and through just and reasonable processes so that its conclusion would be just and reasonable in all respects within the true spirit and intent of the Interstate Commerce law and not arbitrarily and not for some supposed public policy and for some supposed laudable reason in the spirit of paternalism. To take away a just and reasonable schedule of rates from the City of Cincinnati, Ohio, to Chattanooga, Tennessee, was to violate these fundamental principles.

*Interstate Commerce Commission vs Illinois Central R.R. Co.* (1910) 215 U. S. 452, *Mr. Justice White* at p. 470.

*Southern Pacific R. R. Co. vs Interstate Commerce Commission* (*Willamette Valley Case*) (February 20, 1911) 219 U. S. 433.

*Peavey vs Union Pacific R. R. Co.* (1910) 176 Fed. Rep. 409 at 418.



*Monongahela Bridge vs. United States* (1910) 216 U. S. 177 at p. 195.

*Garfield vs. Goldsburg* (1908) 211 U. S. 249.

*Atlantic Coast Line vs. North Carolina Corporation Commission* (1907) 206 U. S. 1.

*Ballinger vs Frost* (1910) 216 U. S. 240 at p. 241.

*Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911) 222 U. S. 42.

In the case at bar the majority of the Commerce Court failed to enter into a discussion of the soundness of the principles laid down by a majority of the Interstate Commerce Commission but simply copied same into their opinion (188 Fed. Rep. 248-252). This is in marked contrast with the logical discussion contained in the classic dissenting opinion of *Judge Archbald* concurred in by *Judge Mack* (188 Fed. Rep. 253-255).

(3.)

**60-Cent schedule of rates not taken away by reason of any mere alleged competitive weak roads argument.**

We have now set out the proposition to be proved (*factum probandum*) (this brief, p. 92); and the transportation or traffic competition between Cincinnati, Ohio, and Chattanooga, Tennessee (this brief, pp. 98); and the substantial similarity of circumstances and conditions of the transportation or traffic competition between Cincinnati, Ohio, and Chattanooga, Tennessee (this brief, p. 15).

We have also referred to the finding of a majority of the Commission (Bill of Complaint, paragraph 31; Record Case No. 774, p. 16; this brief, p.10) that "If it is our duty to take this road by itself and to determine the reasonableness of these rates by reference to cost of construc-



tion, cost of maintenance and profit upon the investment, *we think the Complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.*"

We have set out the schedule of rates formerly found reasonable by the Commission, being the 60-cent schedule of rates (Bill of Complaint, paragraph 31, Record Case No. 774, p. 17; this brief, p. 11).

We have also reverted to what was said by the Commission (Bill of Complaint, p. 47; Record Case No. 774, p. 29-30; this brief, p. 22). "Now, in adjusting the rates of the Louisville and Nashville and the Nashville, Chattanooga and St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?" We have already shown (this brief, pp. 22-24) that it should consider only so much of the L. & N. R. R. Co. and only so much of the N. C. & St. L. Ry. Co. as affected competitive conditions with the C. N. O. & T. P. Ry. Co. from Cincinnati to Chattanooga (this brief, p. 98). This was also illustrated by a diagram (Bill of Complaint, Record Case No. 774, p. 26; this brief, p. 15).

A majority of the Commission in the course of its opinion said (Bill of Complaint, paragraph 48; Record Case No. 774, p. 30).

"In *In the Matter of Proposed Advances in Freight Rates*, 9 I. C. C. Rep., 382, the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the *Spokane case*, 15

I. C. C. Rep., 376, the same subject was considered and the same conclusion reached. The last affirmance of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.*, 15 I. C. C. Rep., 555, in which the rule is stated by Clark, Commissioner, as follows:

“In the *Spokane* case, 15 I. C. C. Rep., 376, we held that the *reasonableness of a rate between two points*, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

“As before suggested, we cannot, in determining competitive rates, select that railroad which is the shortest or most advantageously situated, and limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines.’

“We have no doubt as to the correctness of this principle and believe it must be applied here *within proper limits.*” (18 I. C. C. R. 464.)

A majority of the Commission were distinctly speaking of the reasonableness of a rate between “two points served by two or more carriers” and that the principles laid down “must be applied here within proper limits.”

In the case at bar the gross earnings per mile which each competitive road got were substantially the same. The Commission did not deny the application of the 60-cent schedule of rates because of this substantially similar condition in this traffic or transportation competition for traffic but put it distinctly upon other grounds as will be shown under the next heading.

(4.)

**60-cent schedule of rates taken away for the purpose of maintaining 5,144.35 miles of main lines and branches of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. beyond the lines of transportation or traffic competition and to distribute industry and population among said 5,144.35 miles.**

The facts are admitted and it has been distinctly found by the Commission that the C. N. O. & T. P. Ry. Co. is a single trunk line without branches running from Cincinnati to Chattanooga; that its operation is in fact entirely distinct from the Southern Railroad Company and that the C. N. O. & T. P. Ry. Co. is distinct in fact as well as in name and operation from every other railway company, particularly from the Southern Railway Company (Bill of Complaint, paragraph 31-b; Record Case No. 774, pp. 12-13). It is conceded as a fact and found by the Commission that the traffic or transportation competitor of the C. N. O. & T. P. Ry. Co. is the L. & N. R. R. Co. from Cincinnati to Louisville and from Louisville to Nashville, and the N. C. & St. L. Ry. as a connecting carrier from Nashville to Chattanooga; and that from a traffic or transportation view the competing lines for this traffic from Cincinnati, Ohio, to Chattanooga, Tennessee, are substantially similar (Bill of Complaint, Diagram; Record Case No. 774, p. 26); this brief. p. 15.

The earnings of the C. N. O. & T. P. Ry. Co. are conceded and it was distinctly found by the Commission, taking these elements into consideration, *that complainants have made out their case and were entitled to the 60-cent schedule of rates* (Bill of Complaint, paragraph 31; Record Case No. 774, p. 16); this brief, p. 10.

Stripped of all superfluous language the question is fairly presented whether the Interstate Commerce Commission has power to take away this just and reasonable 60-cent schedule of rates upon the grounds set forth by the Commission. The position of the Commission is that the C. N. O. & T. P. Ry. Co. is to be awarded a schedule of rates higher than the 60-cent schedule of rates not because the C. N. O. & T. P. Ry. Co. needs this revenue; not because the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. needs additional revenue to maintain its competitive conditions with the C. N. O. & T. P. Ry. Co. in competing for the traffic between Cincinnati and Chattanooga, *but for the purpose of enabling the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. to earn excessive revenues on the fragments of their lines between Cincinnati and Chattanooga so that this excessive revenue can go toward maintaining 5,144.35 miles of main line and branches of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. beyond and outside of the competitive territory and diffuse population and industries on said 5,144.35 miles.*

That this was the underlying principle applied by a majority of the Commission is emphasized by the language used by the majority of the Commission and the language used by the minority of the Commission as follows:

**Majority of the Commission.** The position of the majority of the Commission is set forth in the Bill of Complaint, paragraphs 46-47; Record Case No. 774, pp. 28-30) as follows, to-wit:

“(46) Your orators further show that the schedule of rates complained of in said case No. 1542, from Cincinnati, Ohio, to Chattanooga, Tennessee, was said 76 cent schedule in effect over said Cincinnati Southern Railway, a single trunk line without branches, running from Cincinnati, Ohio,

to Chattanooga, Tennessee, as an unjust and unreasonable schedule of rates as in and of itself; and that said complaint in said case No. 1542 was not a complaint against an unjust and unreasonable individual rate, nor a complaint against an unjust and unreasonable specific rate on a given article; but that said complaint in said case No. 1542 was a complaint against said 76 cent schedule of rates maintained by said Cincinnati Southern Railway, operated by said C. N. O. & T. P. Ry. Co., taken by itself as a single trunk line without branches running from Cincinnati, Ohio, to Chattanooga, Tennessee.

"Your orators further show that said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry., or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of the L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, via Louisville, Kentucky, thence over the main line of the N. C. & St. L. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee; that said complaint in said case No. 1542 was not a complaint as to any schedule of rates, joint rates or through rates, maintained by the said L. & N. R. R. Co. on its division, extending from Mobile, Alabama, to New Orleans, La., nor any of its numerous divisions or branches; that said complaint in said case No. 1542 was not a complaint as to any of the rates or schedules of rates, joint rates or through rates maintained by said N. C. & St. L. Ry. on its division between Paducah, Kentucky, and Memphis, Tennessee, nor on any of its numerous divisions or branches.

"Your orators further show that the complaint in said case No. 1542 was not directed against the return on the

value of the property employed in and devoted to the public use and service and for the public convenience by said L. & N. R. R. Co. or said N. C. & St. L. Ry. or both of them.

"(47) Your orators further show that although said complaint in said case No. 1542 was not a complaint against said L. & N. R. R. Co. nor said N. C. & St. L. Ry. or both of them, nor against any joint or through schedule of rates maintained by said L. & N. R. R. Co. or said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, as more particularly set forth in paragraph (46) of this Bill of Complaint; yet said Commission tried case No. 1542 as if said Commission was called upon in said case No. 1542 to adjust the rates on the entire lines (including main line and branches) of said L. & N. R. R. Co. and said N. C. & St. L. Ry.

"Said Commission in adjusting the schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. in its report in said case No. 1542, used language as follows:

" 'Now, in adjusting the rates of the Louisville and Nashville or the Nashville, Chattanooga and St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?

" 'Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch-line business when it reaches the main line is surplus traffic from which a larger profit is made, **It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves.** *It hardly seems proper to fix the rates up on the Cincinnati Southern, which is really a main line,*

*without any reference to the branch lines which contribute to it.*" (18 I. C. C. Rep., p. 465).

"Your orators further show that said Commission in adjusting the schedules of rates of said L. & N. R. R. Co. and said N. C. & St. L. Ry. in said case No. 1542, although the schedules of rates of said two companies were not complained of, nor were the schedules of rates of said two companies at issue in said case No. 1542, *took into consideration the entire main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., the gross earnings per mile for 1907 of the L. & N. R. R. Co. being about \$11,000, and for the same year the gross earnings per mile of the N. C. & St. L. Ry. being less than \$10,000, and determined that said 70 cent schedule of rates should be a schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the route of the main line of said L. & N. R. R. Co. from Cincinnati, Ohio, to Nashville, Tennessee, thence by the main line to the said N. C. & St. Ry. from Nashville, Tennessee, to Chattanooga, Tennessee, a distance of 450.9 miles; and having thus adjusted a schedule of rates of the said L. & N. R. R. Co. and said N. C. & St. L. Ry. from Cincinnati, Ohio, to Chattanooga, Tennessee, thereupon determined and prescribed the said 70 cent schedule of rates as a schedule of rates to be maintained by the said C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, over its single trunk line without branches, 336 miles in length, although the gross earnings per mile of the said C. N. O. & T. P. Ry. Co. for the year 1907 exceeded \$26,000; that said Commission by its order in said case No. 1542 directing and ordering said C. N. O. & T. P. Ry. Co. to maintain said 70 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period*



of not less than two years from July 15, 1910, based upon *a schedule of rates adjusted for the main line and branches of said L. & N. R. R. Co. and said N. C. & St. L. Ry., when said 70 cent schedule of rates thus adjusted for the said L. & N. R. R. Co. and said N. C. & St. L. Ry. if applied to and prescribed for the single trunk line railroad without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, operated by said C. N. O. & T. P. Ry. Co., would yield to said C. N. O. & T. P. Ry. Co. an excessive net profit, to-wit, 44.18 per cent. per annum, on the value of said C. N. O. & T. P. Ry. Co.'s property employed in and devoted to the public service and use and for the public convenience."*

**Power in fact exercised by majority emphasized by opinion of minority.** That the majority was not exercising its power to fix a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, but was merely acting under the form of such power and was in fact exercising a power not delegated to it to promote the public interest by building branch and main lines in distant parts of the country and for diffusing population and industries in distant parts of the country at the cost and expense of the shippers of goods, wares and merchandise from Cincinnati, Ohio, to Chattanooga, Tennessee, either over the C. N. O. & T. P. Ry. Co. or over a fragment of the L. & N. R. R. Co. in connection with a fragment of the N. C. & St. L. Ry. Co., is emphasized by the dissenting opinion of Mr. Commissioner Clements (Bill of Complaint, par. 64. Record Case No. 774, pp. 49-51,) as follows;

"The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,-207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Decatur division \$25,-



227.72, and the Cincinnati to Louisville division \$24,618.15. The average of the whole system was lowered by numerous unprofitable branch lines, one of which earned only \$718.48. The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system. To a certain extent this is true, but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.

"The gross earnings of the Nashville, Chattanooga & St. Louis in that year averaged \$9,882 per mile and the earnings of its main line from Hickman, Ky., to Chattanooga were \$20,295 per mile.

"Numerous other statistics both from this record and from the Commission's files might be produced but I shall merely point out by way of comparison that the first class rate from New York to Chicago, a distance of about 900 miles, is 75 cents, or 1 cent less than the Cincinnati-to-Chattanooga rate for 336 miles, and the local first class rate from Chicago to Cincinnati, a distance of 298 miles, is 40 cents. Objection possibly will be made to this comparison because the carriers do not operate in the same general territory. The only object, however, in so confining a comparison is to consider the respective rates in the light of substantially similar circumstances and conditions of carriage. Reference to tables of earnings, density of traffic, etc., herein will show that these rates are made under transportation conditions favorable in these respects than the rates from Cincinnati to Chattanooga. Only Group 2,

embracing the eastern half of the New-York-Chicago haul approximates the defendant's high standard of general transportation conditions, and Group 3 is far below that standard. Under these circumstances this comparison with the highly competitive Official Classification territory should go far toward convincing that the rates in issue are greatly in excess of a reasonable charge.

"It is stated in the report that—

" 'If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.'

**"Plainly then some very substantial reasons should be advanced for denying the relief asked for,** bearing in mind, of course, the general conditions in this territory and having due regard for the interest of other routes. This suggestion in my opinion is not met by apprehension of injustice to the Louisville & Nashville and Nashville, Chattanooga & St. Louis, whose financial condition is not shown to require less remedial action, or by the reasoning by which it is sought to show that the middle west magnifies its troubles or by which the eastern carriers are absolved from all responsibility for the existing conditions \* \* \*

"As already stated, the present rates from Cincinnati to Chattanooga have been in effect for twenty-eight years, although Nashville, Atlanta, and other southeastern points have had relief, more or less justified in theory and in the degree, extended in the different cases. Reductions to Chat-

tanooga have been made from the east and in conjunction with one of the defendants in this proceedings. Looking to the history of the rates from these sections there is no doubt that as to Chattanooga from the west something is radically wrong, and in disposing of the complaint adequate relief should be given. I do not believe this would result in a wholesale disturbance of just rates to points throughout the south. So far as it would aid in the correction of unjust rates to other places the result is not to be deplored. Judged by any one of the consideration recognized either by the Commission or the courts in determining the reasonableness of transportation charges, the rates complained of exceed the limit of reasonableness to a greater extent than is declared in the report and should be dealt with accordingly.

"I am authorized by Commissioner Lane to state that he concurs in these views." (18 I. C. C. R. 467-477.)

*Mileage of main line and branches outside of transportation or traffic competition.* The total mileage main line and branches of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. are as follows, to-wit:

L. & N. R. R. Co. (Bill of Complaint; Record Case No. 774, p. 23).....	4365.20
N. C. & St. L. Ry. Co. (Bill of Complaint, Record Case No. 774, p. 23).....	1230.05
Total.....	5595.25
Miles of L. & N. and N. C. & St. L. within traffic or transportation competitive conditions.....	450.90
Miles of L. & N. R. R. Co. and N. C. & St. L. Ry. Co. outside of traffic or transportation competitive conditions.....	5144.35

It will thus be seen that but a fraction of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. are within the lines of transportation or traffic competition with the C. N. O. & T. P. Ry. Co. between Cincinnati, Ohio, and Chattanooga, Tennessee.

This is emphasized by a showing of the distributed mileage main line and branches of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. as follows (Bill of Complaint; Record Case No. 774, pp. 20-24, paragraphs 39 and 40) to-wit;

“(39) Your orators further show that at the time of said hearing of said case No. 1542, and since that time, said L. & N. R. R. Co. operated 4365.2 connected miles of railroad in the States of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina between the following points with the following mileages, to-wit:

	Miles.
Louisville, Ky., to Nashville, Tenn.....	185.92
Gallatin, Tenn., to Scottsville, Ky.....	35.92
Hartsville Junc. to Hartsville, Tenn.....	11.36
Louisville, Ky., to Cincinnati, Ohio.....	109.82
East Louisville to South Louisville, Ky.....	4.15
“A” Street Connections to Louisville, Ky.....	.76
Louisville to Pipe line Ave., Ky.....	3.46
La Grange to Lexington, Ky.....	67.00
Shelbyville to Christiansburg, Ky.....	8.51
Anchorage to Shelbyville, Ky.....	18.58
Shelbyville to Bloomfield, Ky.....	26.72
Covington to Corbin, Ky.....	184.02
Ft. Estill Junc. to Rowland, Ky.....	30.47

	Miles.
Brush Creek to Johnetta, Ky.....	4.85
Bardstown Junc. to Springfield, Ky .....	37.44
Lebanon Junc., Ky., to Sinks, Ky.....	107.28
Wilton Junc. to Lorena, Ky.....	3.90
Jellico, Tenn., to Halsey, Ky.....	8.11
Maxie to Kensee, Ky.....	1.78
Cumb. & Ohio Jc. to Greensburg, Ky.....	30.90
Corbin, Ky., to Norton, Va.....	117.44
Orby to Harrison, Ky.....	17.13
Middlesboro, Ky., to Manring, Tenn.....	8.14
Stony Fork Junc. to Logmont, Ky.....	6.08
Logmont to Elwood, Ky.....	2.87
Edgefield Junc., Tenn., to Howell, Ind.....	145.36
Madisonville to Providence Mine, Ky.....	16.10
Memphis Junc., Ky., to Memphis, Tenn.....	259.13
Leewood to Aulon, Tenn.....	2.46
Clarksville, Tenn., to Gracey, Ky.....	32.00
Hematite to Pond, Tenn.....	30.71
Van Leer to Cumberland Furnace, Tenn.....	6.19
Columbia, Tenn., to Florence, Ala.....	81.13
Sheffield to Tuscumbia, Ala.....	2.63
Iron City to Pinkney, Tenn.....	11.78
Napier Junc. to Napier, Tenn.....	10.92
Tenn. & Ala. Junc. to Long Branch, Tenn.....	7.32
Magella to Brickyard, Ala.....	8.02
Winetka to Steinman, Ala.....	3.16
Graces to Bessemer, Ala.....	11.77
Muscoda Junc. to Muscoda, Ala.....	1.50
Blue Creek Junc. to Blockton Junc., Ala.....	27.07
Yolande to Brookwood, Ala.....	8.44
Chamblee to Goethite, Ala.....	3.99
Boyles to Bessemer, Ala.....	15.74

	Miles.
Boyles to Moragne, Ala.....	60.14
Village Springs to Compton, Ala.....	3.32
Palmers to Bradford, Ala.....	4.40
Boyles to Trussville, Ala.....	17.13
Red Gap Junction to Graces, Ala.....	10.26
Tacoa to Gurnee Junction, Ala.....	9.99
Readers to Ferro No. 2, Ala.....	2.30
Vinita to Graves Mine, Ala.....	2.62
Hewitt Junction to Hewitt, Ala.....	0.67
Mattawana to Deming, Ala.....	1.73
Saxton, Ky., to Jellico, Tenn.....	3.19
Valley Creek to Virginia, Ala.....	2.05
No. Ala. Junc. to Searles, Ala.....	3.32
Black Creek to Praco, Ala.....	29.12
Ridgeland to Arcadia, Ala.....	1.32
Mineral Springs to Dunn, Ala.....	1.08
Mineral Springs to Rilma, Ala.....	2.30
Crocker Junc. to Durand, Ala.....	2.59
Udora to Erskine, Ala.....	0.73
Chetopa to Banner, Ala.....	4.02
Vulcan to Sayre Mines, Ala.....	1.69
Altoona to Schuler, Ala.....	1.14
Dolcito Junc. to Dolcito, Ala.....	0.98
Dixiana Junc. to Dixiana, Ala.....	0.52
Connellsville Junc. to Connellsville, Ala.....	1.77
Abernaut to Rock Castle, Ala.....	1.59
Caffee Junc. to Martaban, Ala.....	1.03
Spring Gap No. 1 to Skyhy, Ala.....	1.60
Attalla to Calera, Ala.....	119.07
Shelby to Columbiana, Ala.....	5.84
Gilmore Switch to Gantt's Guarry, Ala.....	1.72
O'Connor Junc. to Buek, Ala.....	2.90

	Miles.
Wewoka Junc. to Wewoka, Ala.....	1.37
Rockspring to Leba, Ala.....	1.65
Prattville Junc. to Prattville, Ala.....	10.35
Montgomery to Mobile Ala.....	177.67
Georgiana, Ala., to Graceville, Fla.....	100.38
Duvall, Ala., to Paxton, Fla.....	23.48
McPhail, Ala., to Lakewood, Fla.....	2.80
Mobile, Ala., to New Oreleans, La.....	140.54
Selma to Escambia Junction, Ala.....	111.09
Camden Junction to Camden, Ala.....	16.55
Selma to Myrtlewood, Ala.....	60.25
Flomaton, Ala., to Pensacola, Fla.....	44.64
Pensacola to River Junction, Fla.....	160.47
Corbin, Ky., to Etowah, Tenn.....	162.66
Holton to Hyde, Tenn.....	2.21
Ilford to Westbourne, Tenn.....	2.93
Dossett to Khotan, Tenn.....	12.24
Khotan to Windrock, Tenn.....	0.72
Etowah, Tenn., to Junta, Ga.....	89.38
Etowah, Tenn., to Marietta, Ga.....	142.57
Armona to Marysville, Tenn.....	3.86
Mentor to Greenback, Tenn.....	17.76
Greenback to Jena, Tenn.....	1.14
Murphy Junc., Ga., to Murphy, N. C.....	23.41
Crestview to Florala, Fla.....	26.40
Gurley Junc. to Lehigh No. 2, Ala.....	7.90
Owensboro to Adairville, Ky.....	83.46
Penrod to Mud River, Ky.....	4.64
Stouts M't'n Junc. to Stouts Mountain, Ala.....	5.91
Bay Minette to Foley, Ala.....	36.52
Providnece to Morganfield, Ky.....	25.33
Ponchartrain Junc. to Milneburg, La.....	4.96

	Miles
Maysville to Paris, Ky.....	49.4
Paris to Lexington, Ky.....	17.3
Yingling to Chadman, Ky.....	2.1
Swan Creek Junc. to Farcette, Tenn.....	17.1
Evansville, Ind., to East St. Louis, Ill.....	160.9
McLeansboro Junc. to Shawnetown, Ill.....	40.7
O'Fallon Junc. to O'Fallon, Ill.....	6.0
Nashville, Tenn., to M.-C. Junc., Ala.....	118.9
Decatur to Montgomery, Ala.....	182.6
Elmore to Wetumpka, Ala.....	6.3
Fedora to Indio, Ala.....	2.9
Hodgeland Junc. to El Vista, Ala.....	0.9
Helena to Acton, Ala.....	7.6
Glasgow Junction to Glasgow, Ky.....	10.5
Elkton to Guthrie, Ky.....	10.9
Track in Nashville, Tenn.....	1.1
Hyde, Tenn., to Fonde, Ky.....	11.2
M. & C. Junction to Decatur, Ala.....	1.6
Furnace Junc. to Sheffield, Ala.....	2.8
Gurnee Jc. to Blocton, Ala.....	14.3
Aden to Masena, Ala.....	3.8
Seymour, Ala., to end of track.....	3.9
Ardella to Hansell, Ala.....	2.9
Wellington, Ala., to Cartersville, Ga.....	77.4
Blocton Junc. to Blocton, Ala.....	7.7
Track to Norton, Va.....	0.7
Apalachia to Big Stone Gap Furnace, Va.....	3.7
Aulon to South Memphis, Tenn.....	5.4
Morgane to Attalla, Ala.....	1.8
Track to Gadsden, Ala.....	0.4
Junta to Atlanta, Ga.....	48.0
Track at East St. Louis, Ill.....	0.1



	Miles.
Track at Cincinnati, Ohio.....	0.61
Relay Depot, East St. Louis, Ill., to Union Station, St. Louis, Mo.....	3.84
Track at River Junction, Fla.....	0.94
Tracks at Selma, Ala.....	0.87
Cent. Un. Dep., Cinti., O., to Covington, Ky.....	2.18
Track at Lexington, Ky.....	0.20
Track at Providence, Ky.....	0.30
Pipe Line Ave. to Prospect, Ky.....	7.70
Track at Lexington, Ky.....	0.22
Track at Owensboro, Ky.....	0.26
Total .....	4,365.20

"Your orators further show that the above lines of road operated by said L. & N. R. R. Co. are shown and set forth in heavy red lines on the drawing hereto attached marked Exhibit "B" and made a part hereof, [Reproduced as an exhibit to this brief; Record Case No. 773, p. 95, and stipulated into Case No. 774; Record Case No. 774, p. 90].

"(40) Your orators further show that at the time of said hearing of said case No. 1542, and since said time, said N. C. & St. L. Ry. operated 1,230.05 connected miles of railroad in the States of Kentucky, Tennessee, Alabama and Georgia between the following points with the following mileages, to-wit:

	Miles.
Chattanooga, Tenn., to Hickman, Ky .....	32.21
Wartrace, Tenn., to Shelbyville, Tenn.....	8.01
Bridgeport, Ala., to Pikeville, Tenn.....	68.10
Decherd to Columbia, Tenn.....	86.35

	Miles.
Elora, Tenn., via Huntsville, Ala., to Tenn. River	
Guntersville to Gadsden, Ala.....	80.08
Tullahoma to Clifty, Tenn.....	84.60
Cowan, Tenn., to Coalmont, Tenn.....	31.17
Nashville, Tenn., to Lebanon, Tenn.....	29.21
Dickson, Tenn., to Allens Creek, Tenn.....	69.91
Kingston to Rome, Ga.....	18.15
Nashville, Tenn., to West Nashville, Tenn.....	6.26
Fayetteville, Tenn., to Lax, Ala.....	36.98
Atlanta., Ga., to Chattanooga, Tenn.....	136.82
Paducah, Ky., to Memphis, Tenn.....	254.20
Total.....	1,230.05

“Your orators further show that the above lines of road operated by said N. C. & St. L. Ry. are shown and set forth in the heavy yellow lines with numerous short lines crossing same on the drawing hereto attached marked Exhibit “B” and made a part hereof.” [Reproduced as an Exhibit to this brief; Record case No. 773, p. 95; stipulated into Case No. 774; Record Case No. 774, p. 90].

That *Mr. Commissioner Clements* was consistent in his dissenting opinion in the case at bar is shown by his opinion in the case of *Hydraulic Press Brick Co. vs. St. Louis & San Francisco R. R. Co.* (April 6, 1908) 13 I. C. C. R. 342 (at pp. 347-348) as follows:

“The Illinois Central Railroad Company not being a party defendant in this case, the Commission can not prescribe the through rates via the route made up of that line and the Morgan’s Louisiana & Texas Railroad & Steamship Company’s line. Neither can it in dealing with the rate applied on the shipments in question prescribe a joint

through rate via the route over which these shipments moved upon the basis of what might be regraded as a reasonable rate via the shorter line. These shipments were carried a distance of 1,208 miles, and *while it is probable that if the lines constituting the longer route are to continue to participate in the business between these points they must accept rates that are not higher than the rates which when applied via the shorter route are reasonable and just, we would not be justified in so ordering or in awarding reparation on past shipments upon that basis. A carrier may in its own interest, if it so desires, carry for a longer distance over its own line than would be necessary if carried between the same points over the line of its competitor in order to obtain a portion of the competitive business upon terms that will afford some profit. It does not necessarily follow, however, that a carrier in competing for traffic in this way thereby subjects itself to an order compelling it to do so.*"

In the case at bar Judge Archbald in his dissenting opinion (188 Fed. Rep. 253 at pp. 254-255) said:

"If the Cincinnati Southern was the only line from Cincinnati to Chattanooga the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. And if it was a line that was costly to build, or that could not be economically run, this would operate to increase the rates and the shipper would have to pay to correspond. But, on the other hand, if the reverse of this was true and the road was neither an expensive one to construct, maintain or run, the shipper would clearly be entitled to the benefit of these conditions and to the lower rates necessarily to ensue. So, also, if this favored road was the first in the field, and other roads had come in after it was built it certainly would not be contended that with the in-

roduction of new and additional facilities the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well placed. It is not to be thought of that the construction of a second or third road should be made the basis for higher rates. The standard would be that of the original and most favored line. But what difference does it make whether the road which can afford the best rate is the first or the last to be built? It is the condition at the time the rate is fixed that controls. The shipper is entitled to the benefit of any advance in transportation facilities that may be made, **and is not to be tied down to the unprogressive and outdistanced past.** The supposed advantage in competing lines between the same points becomes a detriment if rates are to be kept up to help the weakest road."

**Unit of Transportation Service Rendered**—In determining the question whether the Commission exercised in substance the power to fix a just and reasonable schedule of rates or in fact exercised some other power than that of fixing a just and reasonable schedule of rates, the *unit of transportation service rendered* must be kept in mind. Where a schedule of rates is prescribed for a shipment from point A. to point B. the transportation from point A. to point B. becomes the *unit of transportation service rendered*. The *unit of transportation service rendered* in the case at bar is from Cincinnati, Ohio, to Chattanooga, Tennessee, and the schedule of rates in the case at bar becomes a schedule of rates for *this particular unit of transportation service rendered*, to-wit, from a point in Ohio to a point in Tennessee, viz, from Cincinnati, Ohio, to Chattanooga, Tennessee.

Section 1 of the Act to Regulate Commerce of February 4, 1887, as amended June 29, 1906, (Anderson's Index

Digest of Interstate Commerce Laws, p. 4) provides as follows:

**"All charges** made for *any service rendered* or to be *rendered* in the transportation of \* \* \* property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for **such service or any part thereof** is prohibited and declared to be unlawful."

*In the matter of Through Routes and Through Rates*, (1906) 12 I. C. C. R. 163, Mr. Commissioner Lane said (at p. 166):

"A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. *It must have a rate for every service it offers*, and as the route is a new unit—one line formed of two or more connecting lines—*so its rate for every service is a unit.*"

*Deductions.* As we have so frequently pointed out, the Commission distinctly held that the 76c schedule of rates was unjust and unreasonable in and of itself and taking the unit of transportation service rendered by itself from Cincinnati, Ohio, to Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. that a 60c schedule of rates was in and of itself a just and reasonable schedule of rates for this particular unit of transportation service rendered. The Commission proceeded to take away the just and reasonable 60c schedule of rates between Cincinnati, Ohio, and Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. not through the necessities of any traffic or competition conditions between the C. N. O. & T. P. Ry. Co. on the one hand and the L. & N. Ry. Co. from Cincinnati to Nashville and the N. C. & St. L. Ry. Co. from Nashville to Chattanooga whose gross earnings were substantially the same, but upon the ground that main and branch lines over 5,144.35 miles entirely beyond the seat of complaint

and entirely beyond the transportation or traffic competition between Cincinnati, Ohio, and Chattanooga, Tennessee should be supported and for the purpose and in the public interest of diffusing industries and population over said 5,144.35 miles.

**Search for Power.** Attention is called to the case of *Southern Pacific Company vs. Interstate Commerce Commission* (February 20, 1911) 219 U. S. 433, wherein *Mr. Chief Justice White* said (p. 440):

"By this bill it is averred that the rate of \$5.00 fixed by the tariff which the Commission had set aside *was just and reasonable per se.*"

And again (p. 441):

"It was alleged that the Commission, in setting aside the increased tariff of \$5.00 and fixing substantially the old rate, had exceeded the powers conferred upon it by law *because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered.*"

And again (p. 442):

"In the argument at bar the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject and if it finds *the rate complained of is in and of itself unreasonable, having regard to the service rendered*, to order the desisting from charging such rate."

The Supreme Court in this case by a unanimous opinion sustained the position of the carrier.

In the case at bar attention is called to the Bill of Complaint (Bill of Complaint, paragraph 31, sub-paragraph a, b and c; Record Case No. 774, pp. 12-13) as follows:

“(31) That said Commission in its said report, findings of fact and conclusions thereon, and its order and requirements therein, which said report, findings of fact and conclusions thereon were by said Commission referred to and made part of the order therein, said Commission duly found as follows:

“(a) That the questions (1) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio to the City of Chattanooga, Tennessee over said railroad were inherently unreasonable and unreasonable considered in and of themselves; (2) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio to the City of Chattanooga, Tennessee over said railroad were extortionate; and (3) whether the rates upon the said numbered classes from the City of Cincinnati, Ohio to the city of Chattanooga, Tennessee over said railroad were too high, were presented to said Commission; that in so finding said Commission used the following language:

“‘Second, are the rates upon these numbered classes from Cincinnati and Chicago to Chattanooga *unreasonable considered in and of themselves.*’ (18 I. C. C. R., p. 452).

“And again:

“‘The chief contention of the complainants is that these charges are extortionate in view of the circumstances under which the service is rendered.’ (18 I. C. C. R., pp. 457, 458).

“And again:

“‘This brings us to the *inherent* reasonableness of these rates themselves.’ (18 I. C. C. R., p. 459).

“And again:

“‘The complainants insist that these rates from Cincinnati to Chattanooga considered as transportation charges



for the service rendered are too high.' (18 I. C. C. R., p. 459).

"(b) That said C. N. O. & T. P. Ry. *is a single trunk line without branches* running from Cincinnati to Chattanooga; that said C. N. O. & T. P. Ry. Co. is known as the Cincinnati Southern Railroad; that said Commission in so finding used the following language, to-wit:

" 'The Cincinnati Southern Railroad *is a single trunk line without branches* running from Cincinnati to Chattanooga.' (18 I. C. C. R., p. 465).

"(c) That the operation of said C. N. O. & T. P. Ry. Co. *is entirely distinct* from that of any other railroad; that said Commission in so finding used the following language:

" 'Its (C. N. O. & T. P. Ry. Co.) *operation is in fact entirely distinct* from that of the Southern Railway.' (18 I. C. C. R., p. 457).

"Said Commission also used the following language:

" 'We must under this construction of the law dispose of this case as though these two companies (C. N. O. & T. P. Ry. Co. and the Southern Railway Co.) *were distinct in fact as well as in name and in operation.*' (18 I. C. C. R., p. 457.)"

The quotations from the opinion of *Mr. Chief Justice White* in *Southern Pacific Company vs. Interstate Commerce Commission* (February 20, 1911) 219 U. S. 433, and from the Bill of Complaint in the case at bar would seem to make the cases parallel. The Interstate Commerce Commission in the case at bar say that taking the C. N. O. & T. P. Ry. Co. by itself (this brief, p. 00) that complainants had made out their case and were entitled to the 60c schedule of rates. The complainants claimed that the 76c schedule of rates



was unjust and unreasonable in and of itself for the services rendered; the Commission held (this brief, p. 00) that taking the C. N. O. & T. P. Ry. Co. by itself that the 60c schedule of rates was just and reasonable; this was but another way of saying that the 60c schedule of rates was in and of itself just and reasonable for the services rendered.

A careful examination and analysis of the Interstate Commerce Act shows that the Interstate Commerce Commission is given power to condemn unjust and unreasonable rates and to fix just and reasonable rates for a unit of transportation service rendered and each part thereof, but we search in vain for power upon the part of the Interstate Commerce Commission under the guise and form of fixing a schedule of just and reasonable rates between Cincinnati, Ohio and Chattanooga, Tennessee, over the C. N. O. & T. P. Ry. Co. and the collection of extortionate and unreasonable rates for said unit of transportation service for the purpose of supporting unprofitable branch lines outside the seat of complaint and outside the points of transportation or traffic competition, between Cincinnati, Ohio and Chattanooga, Tennessee and diffusing industries and population over 5,144.35 miles of road entirely beyond the transportation or traffic competitive conditions between Cincinnati, Ohio, and Chattanooga, Tennessee.

The Bill of Complaint alleges (paragraph 64; Record Case No. 774 p. 47).

“(64) Your orators further show that the facts set forth below, in the concurring opinion of Commissioner Clements in which Commissioner Lane joined, were undisputed and admitted facts in said case No. 1542. \* \* \* Your orators further show that they hereby adopt said concurring opinion of said Commissioner Clements as a part of this their Bill of Complaint as bearing on a just

and reasonable schedule of rates and as showing to this court the admitted facts."

The demurrer admits these allegations to be true and among other such admitted facts in case No. 1542 were the following as taken from the opinion of *Mr. Commissioner Clements* (Paragraph 64; Record Case No. 774, p. 49) to-wit:

"The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Decatur division \$25,227.72, and the Cincinnati to Louisville division \$24,618.15. The average of the whole system was lowered by *numerous unprofitable branch lines, one of which earned only \$718.48.* The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system. To a certain extent this is true, *but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.*"

It is quite apparent that the basis of the decision of the Interstate Commerce Commission to substitute a 70c schedule of rates instead of a 60c schedule of rates in place of the 76c schedule of rates was not merely the fixing of a schedule of just and reasonable rates apart from the matter of maintaining the unprofitable branch lines beyond the unit of transportation between the City of Cincinnati, Ohio, and Chattanooga, Tennessee, and the diffusing of population and industries on 5,144.35 miles scattered through eleven (11) states; that the order was not based upon a consideration merely of a just and reasonable schedule of

rates between the City of Cincinnati, Ohio and the City of Chattanooga, Tennessee; not merely upon the theory of a power to fix just and reasonable rates; that the 70c schedule of rates was not considered just and reasonable in and of itself and apart from the maintenance of the branch lines beyond the unit of transportation between the City of Cincinnati, Ohio, and the City of Chattanooga, Tennessee and the diffusion of industries and population over 5,144.35 miles scattered through eleven (11) states. The test of the lawfulness of a rate is whether a rate for the unit of transportation service is reasonable or excessive. What was said by *Mr. Commissioner Harlan*, concurred in by *Mr. Commissioner Knapp*, in the dissenting opinion in *Western Oregon Mfgs. Asso. vs. Southern Pac. Co.* (1908) 14 I. C. C. R., 61, that a just and reasonable rate was not the test applied in that case is equally applicable to the case at bar and the decision of the case at bar was because of a supposed public policy in maintaining branch lines far removed from the place of complaint and the unit of transportation service for the laudable purpose of diffusing industries and population over 5,144.35 miles of railroad scattered through eleven (11) states and far removed from the place of complaint (this brief, pp. 82-83). This statement in the dissenting opinion of *Mr. Commissioner Harlan* concurred in by *Mr. Commissioner Knapp* was adopted and endorsed by the Supreme Court of the United States in *Southern Pacific Co. vs. Interstate Commerce Commission* (Willamette Valley case) (February 20, 1911) 219 U. S. 433; (this brief, pp. 90).

What was said by *Mr. Chief Justice White* (at pp. 449-450) in *Southern Pacific Company vs. Interstate Commerce Commission* (Willamette Valley Case) (February 20, 1911)

219 U. S. 433; (this brief, pp. 84-87;89-92) is clearly applicable to the case at bar.

*Mr. Chief Justice White* said (this brief, pp. 85-86) that the Interstate Commerce Commission "did not merely exert the power conferred by law to correct an unjust and an unreasonable rate ,but it made the order which is complained of upon the *theory* that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission *deemed that it would be equitable to shippers in a particular district to put in force reduced rates.* That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the *general policy* of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied *that it was a wise policy to do so.*"

*Mr. Chief Justice White* (this brief, p. 87) also in speaking of the power in fact exercised said "that in substance the subject complained of was not the intrinsic unreasonableness of the new rate which the railroad companies substituted by the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, *and injury arising from circumstances extrinsic to the new rate.*"

*Mr. Chief Justice White* also said (this brief, p. 89) "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the

order was based upon a consideration *merely* of the intrinsic unreasonableness of the rate which was condemned, *we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred*, it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate. \* \* \* Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate the contrary."

Congress has not made the Interstate Commerce Commission a general manager of the railroads.

*Interstate Commerce Commission vs. Chicago Great Western R. R. Co.* (1908) 209 U. S. 108.

Congress has not made the Interstate Commerce Commission manager of the industries of this country.

*Daniels vs. Chicago R. I. & Pac. R. Co.* (1895) 6 I. C. C. R. 458, *Mr. Commissioner Knapp* at pages 478-479.

Congress has not delegated to the Interstate Commerce Commission the fixing of rates upon some basis of some undefined general policy or laudable purpose to be exercised in the spirit of benevolence and paternalism.

*Ballinger vs. Frost* (1910) 216 U. S. 240, at p. 241.

*So. Pacific R. R. Co. vs. Interstate Commerce Commission* (*Willamette Valley case*) (February 20, 1911) 219 U. S. 433; (this brief, pp. 80).

*Interstate Commerce Commision vs. Diffenbaugh* (Nov. 13, 1911) 222 U. S. 42, *Mr. Justice Holmes* at p. 46 lines 4-7 from bottom of page.

In *Ballinger vs. Frost* (1910) 216 U. S. 240, *Mr. Justice Brewer* said (at p. 249) "Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. *However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation.*"

In *Southern Pacific R. R. Co. vs. Interstate Commerce Commission* (*Willamette Valley case*) (February 20, 1911) 219 U. S. 433 (this brief, p. 90) *Mr. Chief Justice White* points out that where the Interstate Commerce Commission in form fixes a just and reasonable rate and does not merely exercise the powers to correct an unjust and unreasonable rate, but made its order on the theory that it possessed the power to work equities and it was wise public policy to fix such rate, that such exercise of power is merely in form and that it in fact exercises a power not given to it.

In *Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911) 222 U. S. 42 (commonly known as the Peavey Elevation Cases) *Mr. Justice Holmes* said (at p. 46):

"The law does not attempt to equalize fortune, opportunities or abilities."

In the case at bar it was very laudable for the Interstate Commerce Commission to make the shippers of goods, wares and merchandise from Cincinnati, Ohio, to Chattanooga, Tennessee, pay an excessive and extortionate

rate so that the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. could fix a similar schedule of rates between the same points, so that the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. could also earn excessive earnings and that these companies' earnings could be used to support unprofitable branch lines and diffuse and scatter industries and population over 5,144.35 miles of road outside and beyond the traffic or transportation competition conditions between Cincinnati, Ohio, and Chattanooga, Tennessee, although such branch lines and such industries and population were far removed from the seat of complaint.

That the Commission did in fact exercise a power not granted to the Commission and merely in the form of fixing a just and reasonable schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee over the C. N. O. & T. P. Ry. Co. is apparent from what was said by the Commission (Bill of Complaint, paragraph 49; Record Case No. 774, p. 32) to wit:

"In this case, *upon a view of the whole situation*, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think *some slight reductions* should be made in the rates to Chattanooga. Railroads *operating south from the Ohio river* are among the *most prosperous in this southern territory*." (18 I. C. C. R., 466 and 467).

The majority of the Interstate Commerce Commission in the case at bar failed to show that the financial condition of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. did not also require remedial action as pointed out by Mr. Commissioner Clements (18 I. C. R. 475; Exhibit A, Record Case 773, p. 91; stipulated into case 774, p. 90). No language is inserted in the opinion of the majority to the contrary as was



pointed out by Mr. Chief Justice White in *Southern Pacific Co. vs. Interstate Commerce Commission* (February 20, 1911) 219 U. S. 433 when he said (pp. 449-450):

"Manifestly this was deemed by the Commission to be the power which was being exerted; since *Mr. Commissioner Harlan*, joined by the Chairman of the Commission dissented on the ground that the order was an exertion of a power not possessed to give effect to a supposed equitable estoppel, **and no language was inserted in the opinion to the contrary.**"

What was done by the majority of the Commission in the case at bar is thus well pointed out by *Mr. Chief Justice White* in *Southern Pacific Co. vs. Interstate Commerce Commission*, (Feb. 20, 1911) 219 U. S. 433 (at p. 452);

"The greater the wrong the lesser the right to redress and the greater the reason for low and competitive rates the stronger the reason for refusing to fix such a rate."

In the case at bar, after the Commission had found that the complainants had established their case as to a just and reasonable schedule of rates to be charged for the unit of transportation service rendered or to be rendered by the C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee, and having found that the said 60 cent schedule would be a just and reasonable maximum schedule of rates to be established and charged by the C. N. O. & T. P. Ry. Co. for the said unit of transportation service, it is submitted that the Commission had no power, and that it was beyond the limitations on its power to say in effect to persons and owners of industries who contemplate locating at either Cincinnati, Ohio, or Chattanooga, Tennessee, that in the public interest rates should be so fixed as to induce or persuade them to locate or diffuse



themselves along the lines of the L. & N. Railroad and the N. C. & St. L. Ry., and that as an inducement for them to locate and diffuse themselves along the lines of the L. & N. Railroad and the N. C. & St. L. Railway, the Commission will authorize the C. N. O. & T. P. Ry. Co. to charge the population and industries already located at Cincinnati, Ohio and Chattanooga, Tennessee a penalty on all goods, wares and merchandise shipped by them under classes 1 to 6, inclusive, from Cincinnati, Ohio to Chattanooga, Tennessee of the following amounts in cents per hundred pounds on the respective classes:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Cents per 100 pounds</i> .....	10	6	13	14	14	7

above the just and reasonable 60 cent schedule of rates, in order that the L. & N. Railroad Co. and the N. C. & St. L. Railway Co. might maintain a higher schedule of rates from Cincinnati, Ohio to Chattanooga, Tennessee via their longer route through Louisville and Nashville, than they otherwise could if the C. N. O. & T. P. Ry. Co. was limited to the just and reasonable 60 cent schedule, so that said higher schedule of rates would give the said L. & N. Railroad and the said N. C. & St. L. Railway such additional revenues that they could make lower rates than would otherwise be possible over the balance of their entire systems, which lower rates would be an inducement for population and industries to diffuse themselves along the main line and branches of the L. & N. and the N. C. & St. L. Rys., in preference to locating at Cincinnati, Ohio and Chattanooga, Tennessee.

The mere stating of the proposition shows the character of the power which the Commission exercised in the case

at bar was beyond the power and the limitations or the power conferred upon the Commission by the Act to Regulate Commerce as amended.

If the principle of making the same rate over two lines with substantially the same earnings per mile between the same termini were sound, yet a majority of the Interstate Commerce Commission erred in law in applying to three hundred and thirty-six (336) miles of C. N. O. & T. P. Ry. Co. which had no branches a rate applicable to over five thousand (5,000) miles of main line and branches belonging to two (2) other systems of railroad, to-wit, L. & N. Railroad System and N. C. & St. L. Railroad System, over five thousand miles of main line and branches traversing eleven (11) states extending beyond the two (2) termini of the competing lines.

A majority of the Commission erroneously considered same and a majority of the Commerce Court merely reaffirmed this error and failed to sustain the action of a majority of the Commission by any line of reasoning but satisfied itself by simply copying the erroneous opinion of a majority of the Commission into the majority opinion of the Commerce Court (188 Fed. Rep. 242-253).

This is in marked contrast with the dissenting opinion of *Judge Archbald* concurred in by *Judge Mack* (188 Fed. Rep. 253-255).

*Judge Archbald* said (188 Fed. Rep. at p. 255):

"The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build and the cost of operating and maintenance is high. But its net earnings are nevertheless large amounting to some 44% on the capital stock. The route between the same points by way

of the **Louisville & Nashville** and the **Nashville, Chattanooga & St. Louis** roads is a third longer, or 450 miles, and both of these roads have more or less unremunerative branch lines and yet the Commission have not only put the two routes on an equality plane but have even considered the influence of unprofitable branches, which have to be taken care of, fixing a rate which shall be fair for the whole system and not simply for the immediate section of road which is involved."

In this connection it may not be amiss to summarize what has been heretofore set forth in the brief.

Cincinnati to Chattanooga *via* C. N. O. & T.

P. Ry. Co. (the road the rates of which are involved in the case at bar—a road without branches; Diagram this brief p.

15; Exhibit X; Record Case No. 774, p. 26 336 miles

Cincinnati to Chattanooga *via* a fraction of

the L. & N. Railroad plus a fraction of the N. C. & St. L. Ry. (See diagram this

brief p. 15 and Exhibit X)..... 450.9 miles

L. & N. main line and branches (this brief

p. 15 and Exhibit X)..... 4,365.20 miles

N. C. & St. L. main line and branches (this

brief p. 15 and Exhibit X)..... 1,230.05 miles

A summary of main line and branches of the

L. & N. and the N. C. & St. L. beyond the two

termini between Cincinnati and Chattanooga is as follows:

L. & N. main line and branches ..... 4,365.20 miles

N. C. & St. L. main line and branches ..... 1,230.05 miles

Both, L. & N. and N. C. & St. L., main

line and branches..... 5,595.25 miles

L. & N. plus N. C. & St. L., Cincinnati to Chattanooga.....	450.90 miles
Main line and branches L. & N. and N. C. & St. L. outside of line from Cincinnati to Chattanooga <i>via</i> fragment L. & N. plus fragment N. C. & St. L.....	5,144.35 miles

All the foregoing facts and said diagram (This brief, Exhibit X) Record Cases Nos. 773 and 774, p. 26) were admitted to be true by the demurrer.

The majority opinion of the Commerce Court in the case at bar (188 Fed Rep. 252) begs the question. **There is no presumption** in the case at bar that the "76 cents schedule" of rates was just and reasonable **because both the majority and the minority of The Commission united in condemning the "76 cents" schedule rates.** The *factum probandum* (i. e. the proposition to be proved) was a just and reasonable schedule rate to be substituted for the **"76 cents schedule" rates unanimously condemned by The Commission.** We have never denied but on the contrary have constantly asserted that rates on other lines in the same territory are evidence (*Fact probans*) (Bill of Complaint, paragraph 52, sub-paragraph, d; Record case No. 774, p. 35; this Brief, p. 33). On the contrary we have contended that it was erroneous for a majority of The Commission to ascertain a rate for the whole L. & N. System 4,365.20 miles extending through 11 states having numerous unprofitable branches and applying that rate as a just and reasonable charge for transportation service rendered from Cincinnati to Chattanooga, a distance of 336 miles, over the C. N. O. & T. P. Ry. Co., a single trunk line without branches, and not even confining the same to substantially the same conditions in substantially the same

territory. *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane* well said (18 I. C. C. R. 475; Exhibit A, Record case 773, p. 91; stipulated into Record case No. 773, p. 90), as follows:

"This suggestion in my opinion is not met by apprehension of injustice to The Louisville & Nashville and Nashville, Chattanooga & St. Louis, **whose financial condition is not shown to require less remedial action.**"

No language is inserted in the opinion of the majority to the contrary, as was pointed out by *Mr. Chief Justice White* in *Southern Pacific Co. vs. Interstate Commerce Commission* (February 20, 1911) 219 U. S. 4333 where he said (pp. 449-450):

"Manifestly this was deemed by the Commission to be the power which was being exerted; since *Mr. Commissioner Harlan*, joined by the Chairman of the Commission dissented on the ground that the order was an exertion of a power not possessed to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to the contrary."

**Order violates section 5 of the Act to Regulate Commerce.** The Bill of Complaint alleges (Bill of Complaint, paragraph 63; Record Case No. 774, p. 47) as follows:

"(63) Your orators further show that Section 5 of said Act to regulate commerce provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for

the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.'

"Your orators further show that, although it is unlawful for a common carrier to enter into any contract, agreement or combination with any other competing common carrier or carriers of less financial strength to divide with said competing common carrier or carriers the aggregate or net proceeds of their earnings or any portion thereof, yet the effect of the Commission's finding and the grounds thereof, as more particularly set forth in paragraph (48) hereof, in spirit and in effect, is a pooling of earnings and the result of the action of said Commission on the shipping public, including the parties aggrieved is the same as if there was a contract, agreement or combination between the said C. N. O. & T. P. Ry. Co. and the L. & N. R. R. Co. and the N. C. & St. L. Ry. and other southern roads for a pooling and division of earnings, and therefore in violation of said Sec. 5 and beyond the powers of said Commission and beyond the limitations on the powers of said Commission."

Pooling has been described by *Mr. Henry Hudson*, published in *Ripley's Railway Problems* (1907) pages 98-122. By the practice of carriers prior to the enactment of the Interstate Commerce Act of February 4, 1887 earnings and tonnage were pooled by competing carriers. In other words, two or more separate units or lines of transportation combined, and their earnings and tonnage were congregated. It was the purpose of Section 5 of the Act to Regulate Commerce approved February 4, 1887 to break up pooling or in other words to break up the congregation or aggregation by competing lines of their earnings and tonnage. What the carriers are forbidden to do under said

Section 5, the majority of the Commission in the case at bar has attempted in effect to do by taking the C. N. O. & T. P. Ry. Co., L. & N. R. R. Co. and N. C. & St. L. Ry. Co. together and treating them, not as competing lines, but as one system and thus depriving shippers of freight from Cincinnati to Chattanooga of the benefit of competitive conditions.

The effect of such practice is well pointed out by *Judge Archbald* in his dissenting opinion in the case at bar (188 Fed. Rep. at p. 255) as follows:

"The supposed **advantage** in **competing lines** between the same points becomes a **detriment** if rates are to be kept up to help the weakest road."

This thought was also forcibly expressed by *Mr. Chief Justice White* in *Southern Pacific Co. vs. Interstate Commerce Commission* (Feb. 20, 1911) 219 U. S. 433 (at p. 452) as follows:

"Indeed, if the order be assumed to have been made merely as the result of the power to correct an unjust and unreasonable rate, then the reasoning by which the order, in so far as it dealt with Portland was concerned, was sustained, comes to this, **that the greater the wrong, the lesser the right to redress, and THE GREATER THE REASON FOR THE LOW AND COMPETITIVE RATE THE STRONGER THE REASON FOR REFUSING TO FIX SUCH A RATE**".

Prior to the Act to Regulate Commerce of Feb. 4, 1887, the C. N. O. & T. P. Ry. Co. might have pooled its earnings or tonnage with the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co., between the City of Cincinnati, Ohio and the City of Chattanooga, Tennessee. As has been pointed out, the distance from Cincinnati, Ohio to Chattanooga, Tennessee, via the L. & N. R. R. Co., through



the Cities of Louisville and Nashville, to Chattanooga, Tennessee, is 450 9-10 miles, while the distance from Cincinnati, Ohio to Chattanooga, Tennessee, over the rails of the C. N. O. & T. P. Ry. Co., is but 336 miles.

Under normal conditions, and with quicker service, the C. N. O. & T. P. Ry. Co., over its short line, would naturally secure a greater share of the competitive business offered for shipment from Cincinnati, Ohio to Chattanooga, Tennessee than would the long line in connection with the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co.

Under a pooling arrangement, the C. N. O. & T. P. Ry. Co. would have transferred from its Treasury a stipulated amount of its earnings on business moving from Cincinnati, Ohio to Chattanooga, Tennessee, to the Treasuries of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co., in lieu of the latter two mentioned Companies making lower freight rates from Cincinnati, Ohio to Chattanooga, Tennessee than made by the C. N. O. & T. P. Ry. Co., in order to justify shippers using the long line through Louisville and Nashville with its inferior service in point of time. Under such a pooling arrangement at common law, the revenue of the C. N. O. & T. P. Ry. Co. would be reduced and go to increasing the revenue of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co.

In the case at bar the Commission found that the 76 cent schedule of rates in and of itself for the service rendered or to be rendered by the C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio to Chattanooga, Tennessee was unjust and unreasonable and that a 60 cent schedule of rates for service rendered or to be rendered from Cincinnati, Ohio to Chattanooga, Tennessee by the C. N. O. & T. P. Ry. Co. was just and reasonable.



And then the Commission, by its order, authorized the C. N. O. & T. P. Ry. Co. to put into effect the 70 cent schedule of rates by way of adjusting the rates of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co.

The action of the Commission in authorizing the C. N. O. & T. P. Ry. Co. to maintain the 70 cent schedule of rates from Cincinnati, Ohio to Chattanooga, Tennessee, when the just and reasonable schedule of rates for the service rendered or to be rendered by the C. N. O. & T. P. Ry. Co., as found by the Commission, was the 60 cent schedule of rates, in order that a higher schedule of rates might be maintained from Cincinnati, Ohio to Chattanooga, Tennessee by the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. over their long route, than they otherwise could maintain if the said just and reasonable 60 cent schedule of rates was established and charged by the C. N. O. & T. P. Ry. Co. for service rendered or to be rendered by it from Cincinnati, Ohio to Chattanooga, Tennessee over its short line, in effect amounts to the pooling of freight rates on the first six classes from Cincinnati, Ohio to Chattanooga, Tennessee on basis of the 70 cent schedule between the C. N. O. & T. P. Ry. Co. on the one hand and the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. on the other hand, under authority of the Commission.

The order of the Commission in the case at bar is contrary to the letter and spirit of Section 5 of the Act to Regulate Commerce and more offensive than the common law pooling which it was the purpose of Section 5 of said Act to stamp out. The purpose of Congress in inhibiting pooling was to prevent two lines or routes running between two competitive points to so pool their issues as to suppress competition in rates and thus force upon the public a higher schedule of freight rates between two such points than is

just and reasonable for the service rendered or to be rendered by either of the competitive lines.

The order of the Commission, which practically pools the 70 cent schedule of rates from Cincinnati, Ohio to Chattanooga, Tennessee, as between the C. N. O. & T. P. Ry. Co., the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co., when the just and reasonable schedule for the service rendered or to be rendered by the C. N. O. & T. P. Ry. Co. is the 60 cent schedule, as found by the Commission, is not only a pooling of rates, but savors strongly of a spirit of governmental paternalism.

**(h) Sixty cent schedule of rates taken away because of claim of vested rights in unreasonable schedule of rates; because Cincinnati was not entitled to its natural advantages; because of other rate adjustments.**

The Bill of Complaint among other things alleges (Bill of Complaint, paragraph 54, sub-paragraph a; Record Case No. 774, p. 40).

“(a) Said Commission erroneously attempted to justify its action in not prescribing said 60 cent schedule of rates that the rates from Cincinnati to Chattanooga and Louisville to Chattanooga had been the same for the last twenty-eight years; that the distance is substantially the same, and that said relation in rates would undoubtedly be maintained in the future; that the language of said Commission was as follows:

“ ‘The rate from Cincinnati and Louisville to Chattanooga has been the same for the last twenty-eight years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future’ (18 I. C. C. R., 462).

"Your orators further show that said C. N. O. & T. P. Ry. Co. has no vested right in a particular schedule of rates, and that said parties aggrieved should not be barred by lapse of time from having substituted a 60 cent schedule of rates in place of a 76 cent schedule of rates, which latter schedule of rates has been condemned by the Commission as unjust and unreasonable in said case No. 1542.

"Your orators further show that said parties aggrieved have a right to any and all natural advantages that they may have in the existence and location of said Cincinnati Southern Railway, a single trunk line with two termini and no branches extending from Cincinnati, Ohio, to Chattanooga, Tennessee, and that it is beyond the powers of said Commission to take away said natural advantages."

It will thus be noticed that while the Commission held that a 76 cent schedule of rates was in and of itself unjust and unreasonable and that a 60 cent schedule of rates was in and of itself just and reasonable, that the Commission would substitute a 70 cent schedule of rates because the distance from Cincinnati to Chattanooga and the distance from Louisville to Chattanooga were practically the same and that the same schedule of rates had prevailed for twenty-eight (28) years from Cincinnati to Chattanooga as from Louisville to Chattanooga. It would seem from this that the Commission based its exercise of power under a belief that there was a vested right in a particular schedule of rates because the same had existed for twenty-eight (28) years. It might be true that the relation of rates would be maintained and that there should be a corresponding reduction from Louisville, Kentucky, to Chattanooga, Tennessee, but this was no legal reason to deprive the complainants of the full relief prayed for. In the case at bar the Commission denied the relief on the erroneous

belief that there was a vested right in this particular schedule of rates. It has been clearly settled that there is no vested right in a particular schedule of rates.

*Board of Trade vs. A. M. Ry. Co.* (1893) 6 I. C. C. R., 1, at p. 34.

*The Southwestern Kansas Farmers & Business Men's League vs. A. T. & St. F. Ry. Co.*, (1907) 12 I. C. C. R., 530 at 534.

*Reynolds vs. Southern Express Co.*, (1908) 13 I. C. C. R., 536.

*L. & N. R. R. Co. vs. Interstate Commerce Commission*, (April 9, 1910) 184 Fed. Rep. 118, at p. 127.

*E. P. & G. R. R. vs. Interstate Commerce Commission*, (1899) 99 Fed. Rep. 52 at pp. 63-64.

*Moore on Interstate Commerce*, (1910) 145, Sec. 81.

In *L. & N. R. R. Co. vs. Interstate Commerce Commission*, (April 9, 1910) 184 Fed. Rep. 118, *Circuit Court Judge Severens* said (at p. 127):

"It is further urged that the alteration proposed would derange the schedule of rates on other routes, and that this would present difficulties of great moment. But these difficulties, if they exist, would be likely to attend any change of rates between any localities, and the result of the argument would be that, when once a general scheme of rates had been settled, they must remain for an unlimited time unchangeable in any part of the territory, a result which would be wholly inadmissible. Besides, we conceive that, when the complainant raised its rates, it encountered like difficulties, and it does not appear they were then insurmountable, at least that they were not so much so as to deter it from changing its rates. If any such difficulty

arises, it will be a matter for the commission to adjust when it is made to appear."

In *East Tennessee & G. R. Co. vs. Interstate Commerce Commission*, (1899) 99 Fed. Rep. 52, *Circuit Judge Taft* concurred in by *Mr. Circuit Justice Harlan* and *Circuit Judge Lurton* said (at pp. 63-64):

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole Southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her shown in the diagram; and that her rates have been the key to the Southern situation. The length of time which an abuse has continued does not justify it. It was because time has not corrected abuses of discrimination that the Interstate Commerce Commission act was passed."

It will be noted in the case at bar that the Commission did reduce the schedule of rates from a 76 cent schedule to a 70 cent schedule. This would probably be followed by a voluntary reduction on the part of the L. & N. Ry. of its schedule of rates from Louisville to Chattanooga and a maintenance of the relation of rates in the future as in the past. The same consequences would be followed from the fixing of a 60 cent schedule of rates and it is inconceivable to us why the complainants should be denied the relief prayed for when the consequences in each case would have been the same so far as it pertained to the maintenance of relation of rates. The City of Cincinnati was entitled to its natural advantages.

*Interstate Commerce Commission vs. Western Atl. Ry. Co.*, (1898) 88 Fed. Rep., 186 at 193.

*Brewer vs. Central R. R. Co. of Georgia*, (1898) 84 Fed. Rep., 258 at 268.

*Daniels vs. Chicago, Rock Island & Pacific R. R. Co.*, (1895) 6 I. C. C. R., 458 at pp. 478-479.

*Moore on Interstate Commerce*, (1910) Sec. 88, p. 154.

*Interstate Commerce Commission vs Diffenbaugh* (1911) 222 U.S. 42, *Mr. Justice Holmes* at p. 46 line 4 from bottom of page.

That the majority of the Commission was not exercising the power to fix a schedule of rates just and reasonable in and of itself from the City of Cincinnati to the City of Chattanooga but exercising a power to take away from the City of Cincinnati its natural advantages and confer these natural advantages on other points is apparent from the dissenting opinion of *Mr. Commissioner Clements* in which *Mr. Commissioner Lane* joined (this brief, p. 33) wherein it is said "a complainant city is not to be deprived of the benefit of its location and natural advantages merely because a carrier has seen fit to load itself down with such losing properties, many of which in the present instances are far removed from the seat of complaint."

*Mr. Commissioner Clements* was there referring (this brief, p. 34) to the natural advantages of the City of Cincinnati located at the terminus of an almost straight single trunk line without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, a distance of 336 miles, which line was not loaded down with unprofitable branch lines; and he was further asserting that there was no power in the Commission to deprive the City of Cincinnati of its natural advantages for the purpose of maintaining unprofitable branch lines on the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. whose branch lines were far removed from the seat of complaint.

In *Interstate Commerce Commission vs. Diffenbaugh* (Nov. 13, 1911) 222 U. S. 42 (commonly known as the Peavy elevation cases), Mr. Justice Holmes said (at p. 46):

"The law does not attempt to equalize fortune, opportunities or abilities."

## V.

**COMMISSION PURPORTED TO ACT WITHIN THE  
FORM OF ITS POWERS BUT COMMISSION  
ACTED ARBITRARILY AND BY MERE FIAT  
AND FOR ITS OWN CONVENIENCE AND IN  
SUCH AN UNREASONABLE MANNER AND  
BY SUCH UNREASONABLE PROCESSES  
THAT ADMINISTRATIVE RULING  
WITHIN THE SHADOW AND NOT  
WITHIN THE SUBSTANCE OF  
THE AUTHORITY GIVEN.**

A majority of the Commerce Court failed to pass upon the question whether the "Commission purported to act within the form of its powers but Commission answered arbitrarily and by mere fiat and for its own convenience and in such an unreasonable manner and by such unreasonable processes that administrative ruling within the shadow and not within the substance of the authority given, as indicated in the above heading."

Three questions were distinctly made in the bill of complaint and in the brief before the Commerce Court and yet a majority of the Commerce Court considered but two questions saying "there are two questions presented to this Court for decision" (188 Fed. Rep. 248). **It is therefore apparent that the Commerce Court failed to pass**



**on one of the questions presented by the pleadings and by the briefs, to-wit, the one above indicated.**

The case has already been stated at length in a previous part of this brief (this brief, pp. 3-11). More briefly put, the C. N. O. & T. P. Ry. Co. is a single trunk line without branches, whose operation is entirely distinct from any other railroad or railroad company (this brief, pp. 3-4); that it maintained a schedule of class rates between the City of Cincinnati, Ohio, and Chattanooga, Tennessee known as the 76 cent schedule of rates (this brief, p. 4); that the capital stock and the value of the property of the C. N. O. & T. P. Ry. Co. devoted to and employed in the public service and use and for the public convenience amounted to \$5,000,000 (this brief, p. 5); that considering the capitalization and the value of the property devoted to the public service and the operating revenue of the company and deducting therefrom rentals, interest, taxes, operating expenses and every other expense and charge that the average net profits of the company amounted to 44.43% per annum. The distinct issue raised in the case was that the 76 cent schedule of rates was unjust and unreasonable in and of itself. The Commission held that if the Commission took the C. N. O. & T. P. Ry. Co. by itself, or in other words, if the Commission considered the question whether the schedule of rates was in and of itself unjust and unreasonable, then the 76 cent schedule of rates was unjust and unreasonable; and, further taking the C. N. O. & T. P. Ry. Co. by itself, or in other words, taking up the question of a just and reasonable schedule of rates in and of itself that a 60 cent schedule of rates in and of itself was just and reasonable (this brief, p. 10). In view of its own finding that a 60 cent schedule of rates was



just and reasonable in and of itself, the Commission thereupon substituted a 70 cent schedule of rates. The arbitrary manner in which this was done seems apparent when we consider that the reductions in fact made in cents per hundred pounds were as follows (this brief, p. 12):

<i>Classes</i> .....	1	2	3	4	5	6
<i>Reduction in cents per 100 lbs.</i> ....	6	5	4	3	2	1

The classes, the 76 cent schedule of rates, the 60 cent schedule of rates and the reductions in cents per hundred pounds would be as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>76 cent schedule in cents per 100 lbs.</i> .....	76	65	57	47	40	30
<i>60 cent schedule in cents per 100 lbs.</i> .....	60	54	40	30	24	22
<i>Reduction in cents per 100 lbs.</i> ....	16	11	17	17	16	8

The classes, the 76 cent schedule of rates, the 70 cent schedule of rates and the reductions in cents per hundred pounds were as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>76 cent schedule in cents per 100 lbs.</i> .....	76	65	57	47	40	30
<i>70 cent schedule in cents per 100 lbs.</i> .....	70	60	53	44	38	29
<i>Reduction in cents per 100 lbs.</i> ....	6	5	4	3	2	1

From this it is apparent that the Commission in substituting the 60 cent schedule of rates for the 76 cent schedule of rates was not acting arbitrarily but was making

reductions in cents per hundred pounds upon some intelligent basis, while in substituting the 70 cent schedule of rates for the 76 cent schedule of rates it is quite apparent that the Commission did not have in mind the fixing of the 70 cent schedule of rates as a schedule of just and reasonable rates but was making as the Commission said "a slight reduction" by arbitrarily reducing the rates in cents per hundred pounds upon the various classes as above indicated, namely: 6 cents for the first class; 5 cents for the second class; 4 cents for the third class; 3 cents for the fourth class; 2 cents for the fifth class and 1 cent for the sixth class, a geometrical ratio of one cent on each class; a mere slight, arbitrary reduction without respect to the duty distinctly devolving upon the commission to substitute for an unjust and unreasonable schedule a just and reasonable schedule of rates.

The 60 cent schedule of rates would have reduced the average yearly net profits for the C. N. O. & T. P. Ry. Co. from 44.43% to 40.66% (this brief, pp.7-8); the 70 cent schedule of rates would effect a reduction of but \$12,000 a year and would have merely reduced the average annual net profits from 44.43% per annum to 44.18% per annum—a reduction of just one-quarter of one per cent. (this brief, p. 8).

The Commission then proceeded to take away the 60 cent schedule of rates found by the Commission to be just and reasonable in and of itself because of the existence of the L. & N. R. R. Co. and its numerous branches with 4,365.20 miles of track extending through eleven (11) states, and the existence of the N. C. & St. L. Ry. Co. with 1,230.05 miles of track extending through four (4) states, a total of main line and branches of 5,595.25 miles

extending through eleven (11) states (this brief, pp. 34, 37). The Commission duly found the gross earnings of the C. N. O. & T. P. Ry. Co.; the gross earnings of that portion of the lines of the L. & N. R. R. Co. between Cincinnati, Ohio, and Louisville, Kentucky; the gross earnings of that portion of the lines of the L. & N. R. R. Co. between Louisville, Kentucky, and Nashville, Tennessee; the gross earnings of the N. C. & St. L. Ry. Co. between Hickman, Kentucky, and Chattanooga, Tennessee; and the gross earnings of the entire L. & N. R. R. system operated by the L. & N. R. R. Co., main line and branches, 4,365.2 miles in length in the states of Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Georgia, Mississippi, Louisiana, Virginia and North Carolina (this brief pp. 17-18). It also appeared from the undisputed facts in the record that the net income of the L. & N. R. R. Co. for its entire main line and branches, many of which are far removed from the seat of complaint, would amount to a return of between 10 and 11 per cent. per annum on the capital stock (this brief, p. 17).

Attention is called to the fact that the case at bar was not a complaint against the L. & N. R. R. Co. nor against the N. C. & St. L. Ry. Co., yet the Commission tried the case before it as if it were called upon to adjust the rates upon the entire lines, including main line and branches, of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. (this brief, p. 20). The Commission thereupon arrogated to itself powers not delegated to it and exercised powers in a spirit of paternalism and for a laudable purpose and some vague principle of vague general public policy and vague general interest for the diffusion of population and industries over the main line

and branches of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. (this brief, p. 20). The fact that the majority of the Commission did exercise a power not delegated to the Commission was emphasized by the dissenting opinion of *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane* (this brief, p. 118).

The Bill of Complaint distinctly alleged (Bill of Complaint, paragraph 54, sub-paragraph b; Record Case 774, pp. 36-37).

**"There being no facts in the record in case No. 1542 to show or tending to show that by so doing the said other roads [i. e. L. & N. and N. C. & St. L.] would not earn a fair return on the value of their property devoted to and employed in the public service and use, and for the public convenience."**

The Bill of Complaint further alleged (Bill of Complaint, paragraph 54, sub-paragraph c; Record Case 774, p. 37).

"Your orators further show that the parties aggrieved should not be denied justice because the Commission might be called upon to render justice to communities in the South other than Chattanooga, Tennessee."

The Bill of Complaint further alleged (Bill of Complaint, paragraph 54, sub-paragraph c): "The parties aggrieved should not be deprived of justice because of any inconvenience to the Commission in hearing just complaints."

The Bill of Complaint further alleged (Bill of Complaint, paragraph 54, sub-paragraph c; Record Case No. 774, p. 40).

"Your orators further show that the parties aggrieved should not be done an injustice and be deprived of said

60 cent schedule of rates because some other common carriers subject to the act to regulate commerce and whose lines do not reach either Cincinnati, Ohio, or Chattanooga, Tennessee, might not make a change in the relation of rates to correspond with the said 60 cent schedule of rates, provided said 60 cent schedule of rates was established from Cincinnati, Ohio, to Chattanooga, Tennessee."

The Bill of Complaint further alleged (Bill of Complaint, paragraph 54-a; Record Case No. 774, p. 40).

"Your orators further show that there was no evidence in said case No. 1542 to show or tending to show, or facts within the cognizance of said Commission, nor did the Commission in its report in said case make any finding, that had the C. N. O. & T. P. Ry. Co. been ordered to establish and maintain said 60 cent schedule of rates from Cincinnati, Ohio, to Chattanooga, Tennessee, for a period of not less than two years from July 15, 1910, and because thereof other carriers correspondingly lowered their rates as conjectured by the Commission, that the said conjectured lower rates would have yielded said other carriers less than a reasonable return upon the fair value of the property which said other carriers employ in and devote to the public service and use and for the public convenience."

The Bill of Complaint distinctly alleges that the circumstances and conditions under which the C. N. O. & T. P. Ry. Co., for the unit of transportation service rendered or to be rendered from the City of Cincinnati to the City of Chattanooga, a single trunk line without branches, are entirely dis-similar from the circumstances and conditions under which the L. & N. R. R. Co. and

the N. C. & St. L. Ry. Co. are operated through their respective thousands of miles (Bill of Complaint pp. 39-40; Record Case No. 774, pp. 21-24). There is, of course, transportation or traffic competition between the C. N. O. & T. P. Ry. Co. from Cincinnati Ohio, to Chattanooga, Tennessee on the one hand and the two fragments of the L. & N. R. R. Co. and the N. C. & St. L. Ry. Co. (this brief, p. 15) on the other, but this competition seems to be carried under substantially similar circumstances and conditions, nor did the Commission take away the 60 cent schedule of rates by reason of any alleged competitive weak roads argument (this brief, pp. 15). Cincinnati, Ohio, had certain well-defined, recognized and admitted natural advantages (Bill of Complaint, p. 64; Record Case No. 774, p. 49); that the action of the majority of the Commission was the exercise of a power **to deprive the City of Cincinnati of its natural advantages** is well set forth in the opinion of *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane* (this brief, p. 34.)

It is apparent from the opinion of the Commission that the substitution of a just and reasonable schedule of rates between the City of Cincinnati, Ohio, and Chattanooga, Tennessee, might call attention of other shippers at other points to the fact that their rates might need re-adjustment and would cause other complaints to be filed and cause the Commission to be put to the trouble of investigating such other complaints, is no reason why the Cincinnati shippers should be deprived of justice because of any inconvenience to the Commission in hearing such other complaints.

In *Interstate Commerce Commission vs. Stickney*, (1909) 215 U. S. 98, the Interstate Commerce Commission re-

duced a terminal charge because the unit of charge, to-wit, transportation charge plus the terminal charge was unreasonable. The terminal charge in and of itself was reasonable, but the Commission reduced the terminal charge and did not enter into an inquiry as to whether the transportation charge outside of the terminal charge was just and reasonable in and of itself. It was undoubtedly convenient for the Commission to strike down the terminal charge which saved an investigation into transportation charge outside of the terminal charge. In condemning the action of the Commission in thus dealing with the problem, *Mr. Justice Brewer* said (at pp. 109-110):

"Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss, while the real wrongdoers will escape. *It may be that it is more convenient for the Commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice.*"

So in the case at bar, it may be convenient for the Commission to discuss the questions of commercial competition at Memphis and other points and to deliberately deprive the City of Cincinnati of its natural advantages, but the convenience of the Commission should not be the



measure of justice in the case at bar. If we take the report of the Commission which is made a part and parcel of the order of the Commission by its four corners, the Commission distinctly failed to find that the 70 cent schedule of rates was a just and reasonable schedule of rates, but the Commission merely said that considering these matters, which were beyond the power of the Commission, that it would make a SLIGHT reduction in said 76 cent schedule of rates (this brief, p. 11).

There is a strong analogy in the language of the majority of the Commission in the case at bar to that used by majority of the commission in the *Willamette Valley Case*. In the case at bar the Commission said they would make a "slight reduction" (18 I. C. C. R. 467) and in the *Willamette Valley Case* (14 I. C. C. R. 73, top line) the Commission said that the charges would be "somewhat advanced." In the *Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission* 219 U. S. 433) Mr. Chief Justice White condemned a method of rate making by the Commission of making changes "somewhat advanced" when a different relief was required in law and fact and distinctly held that the mandate of the Act to Regulate Commerce should be obeyed which Act provides (as interpreted by Mr. Justice Chief White) that the charge for the service rendered or to be rendered for the transportation of property by the particular carrier should be just and reasonable *per se, i. e.,* in and of itself. It would seem to follow logically that to condemn a system of rate making based upon the principle of charges "somewhat advanced" when the law and facts called for a different relief would likewise condemn a practice of the Commission of making charges *i. e.* rates



based upon the principle of "slight reduction" when the law and facts call for greater relief.

This was therefore, an arbitrary exercise of power upon the part of the Commission and a failure on the part of the Commission to reach a conclusion by any reasonable processes of reasoning and to act by mere fiat and in disregard of the Act to Regulate Commerce of Feb. 4, 1887 and Acts amendatory thereto and supplementary thereof.

The Commission has distinctly found that a 60 cent schedule of rates taken in and of itself is just and reasonable and we take it that we have a right to take the Commission at its own opinion on this point.

An examination of the report of the Commission in the case at bar made a part of its order by express reference, clearly shows that a majority of the Commission decided this case arbitrarily and did not arrive at their conclusions through just and reasonable processes but upon the supposition that the Commission possessed some vague power to be exercised for some laudable purpose; to diffuse population and industries through eleven (11) states; to put various cities not favored by nature on an equality with the City of Cincinnati; to deprive Cincinnati of its natural advantages. This was the exercise of mere arbitrary power and the Commission acted by mere fiat and not in harmony with the reason, intent or spirit of the Act to Regulate Commerce and the acts amendatory thereof and supplemental thereto.

*Interstate Commerce Commission vs. Duffenbaugh* (Nov. 13, 1911) 222 U. S. 42, (popularly known as the *Peavey Elevation Case*) is a happy illustration wherein the Supreme Court of the United States annulled an order of the Interstate Commerce Commission for arbitrarily disregarding

the mandate of the Act to Regulate Commerce of February 4, 1887 and the Acts amendatory thereof and supplementary thereto. Section 1 of the Act to Regulate Commerce provides that transportation shall include "elevation." Section 15 provides that when a shipper performs any part of transportation, the carrier shall compensate the shipper. Some shippers owned elevators and some did not; some elevators, therefore, performed elevation and some did not and could not. The Commission prohibited carriers from paying shippers who owned elevators compensation for performing elevation service. Because some shippers had elevators and received compensation from the carriers for elevation service and other shippers did not have elevators and therefore did not and could not receive compensation for elevator service, the Interstate Commerce Commission entered an order prohibiting carriers from paying and shippers from receiving compensation for elevation service performed by shippers. The Commission purported to act under the mandate of the statute which prohibits undue discrimination and unreasonable and unjust preference and advantage. The Supreme Court of the United States held that the action of the Commission in attempting to equalize the industrial advantages of one shipper having an elevator with another shipper not having an elevator was arbitrary and in violation of the Act to Regulate Commerce. *Mr. Justice Holmes* (who delivered the opinion of the Supreme Court of the United States) said, among other things, (at p. 46):

"The law does not attempt to equalize fortunes, opportunities or abilities."

The opinion of *Mr. Justice Holmes* in *Interstate Commerce Commission vs. Diffenbaugh*, *supra*, decided Nov. 13,

1911, seems to have had its effect upon the whole Interstate Commerce Commission because 28 days later, December 11, 1911, in *Ashland Fire Brick Company vs. Southern Railway Co.*, 22 I C. C. R. 115, the Interstate Commerce Commission by *Mr. Commissioner Lane* in harmony with his concurrence in the dissenting opinion in the case at bar laid it down, that:

*"Power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another or to treat all railroads as part of one great whole, apportion to each a certain territory, or to require all to meet upon a common basis at all points."*

In the case at bar the mandate of the statute as interpreted by *Mr. Chief Justice White* in the *Willamette Valley Case (Southern Pacific Co. vs. Interstate Commerce Commission, 219 U. S. 433)* provides that the charge for the service rendered or to be rendered for the transportation of property by a particular carrier shall be just and reasonable *per se* i. e., in and of itself. In the case at bar a majority of the Interstate Commerce Commission instead of ascertaining and determining the fair and reasonable charge to be made by the C. N. O. & T. P. Ry. Co. for the transportation of class freight from Cincinnati, Ohio to Chattanooga, Tenn., arbitrarily fixed a schedule of rates for the expressed and avowed purpose of diffusing and distributing population and equalizing fortunes, opportunities and abilities located on more than 5,000 miles of main lines and branches, many unprofitable, located beyond the two termini between Cincinnati, Ohio, and Chattanooga, Tenn. of the C. N. O. & T. P. Ry. Co. 336 miles long on the one hand and a fragment of the L. & N. Railroad plus a fragment of the N. C. & St. L. Railway the two fragments to-

gether being 450.9 miles. The mandate of the statute is to fix a just and reasonable charge for the transportation service rendered and not in the language of *Mr. Justice Holmes* (at p. 46, line 47 from bottom of page in *Interstate Commerce Commission vs. Duffenbaugh, supra*) "to equalize fortune, opportunities or ability."

The same thought is well expressed in the dissenting opinion of *Judge Archbald* in the case at bar (188 Fed. Rep. 255) as follows:

"The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build, and the cost of operation and maintenance is high. But its net earnings are nevertheless large, amounting to some 44 per cent. on the capital stock. The route between the same points by way of the Louisville & Nashville and the Nashville, Chattanooga and St. Louis roads is **a third longer or 450 miles, and both of these roads have more or less unremunerative branch lines.** And yet the Commission have **not only put the two routes on an equality,** but have even considered the **influence of unprofitable branches,** which have to be taken care of, fixing a rate which shall be fair for the whole system, and not simply for the immediate section of road which is involved. This, in my judgment, they have no right to do. The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just, by the consideration of what some other road, **not so favorably situated,** may need."

In *Monongahela Bridge Co. vs. United States*, (1910) 216 U. S. 177, Mr. Justice Harlan said (p. 195):

"Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

In *Garfield vs. Goldsby*, (1908) 211 U. S. 249, Mr. Justice Day said (at p.262): "There is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In *Atlantic Coast Line Co. vs. North Carolina Corporation Commission*, (1907) 206 U. S. 1, Mr. Justice White said (at p. 20):

"As the public power to regulate railways and the private right of ownership of such property co-exist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the power of regulation is exerted in such *an arbitrary and unreasonable way* as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

The Act to Regulate Commerce gives the Commission power to fix a schedule of rates and prescribes that the charges shall be just and reasonable for the service rendered or to be rendered.

The powers exercised by a majority of the Commission was as if Section 1 of the Act to Regulate Commerce read as follows:

#### “AN ACT

“To Fix a schedule of Rates on the C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio, to Chattanooga, Tennessee.

*“Be It Enacted By the Senate and House of Representatives of the United States of America in Congress Assembled, That,*

“WHEREAS, C. N. O. & T. P. Ry. Co. operates a single trunk line without branches from Cincinnati, Ohio, to Chattanooga, Tennessee, its two termini, a distance of 336 miles; *and,*

“WHEREAS, a ‘60 cent schedule’ of rates is a just and reasonable schedule of rates, to-wit, a fair and reasonable charge for the services rendered and to be rendered in the transportation of property of shippers from said Cincinnati to said Chattanooga over said C. N. O. & T. P. Ry. Co. and fully compensates said C. N. O. & T. P. Ry. Co. for such services rendered and to be rendered; *and,*

“WHEREAS, 114 miles of L. & N. R. R. Co. from said Cincinnati to Louisville, plus

185.9 miles of L. & N. R. R. Co. from said Louisville to Nashville, plus 151 miles of N. C. & St. L. Ry. Co. from said Nashville to said Chattanooga, making together 450.9 miles, is a competing line of railway from said Cincinnati to said Chattanooga; *and*,

“WHEREAS, the gross earnings per mile of each of said two competitive lines of railway from Cincinnati to Chattanooga are substantially the same; *but*,

“WHEREAS, said L. & N. R. R. Co. consists of 4,365.20 miles of main line and branches; and said N. C. & St. L. Ry. Co. consists of 1,230.05 miles of main line and branches, making together 5,595.25 miles of railway extending through eleven (11) states; *and*,

“WHEREAS, said 5,595.25 miles less said 450.9 miles, to-wit 5,175.35 miles extend beyond points between Cincinnati and Chattanooga; *and*,

“WHEREAS, numerous branches of said two systems, to-wit, said L. & N. R. R. Co. and said N. C. & St. L. Ry. Co. are unprofitable which among other things drag down the earnings from \$25,593.40 per mile between said Cincinnati and said Chattanooga to \$11,207.67 per mile; *and*,

“WHEREAS, it will equalize conditions between said 336 miles of railway of said C. N. O. & T. P. Ry. between said Cincinnati and said Chattanooga, and said 5,175.35 miles of railway, main line and branches, of said L. &

N. R. R. and said N. C. & St. L. Ry. at points beyond said Cincinnati and said Chattanooga, and diffuse industries and population over said 5,175.35 miles of railway and confer the natural advantages of Cincinnati on points suffering from natural disadvantages, to add 10 cents to said '60 cent schedule' of rates between said Cincinnati and said Chattanooga, over said C. N. O. & T. P. Ry.; NOW, THEREFORE,

"Section 1: Said C. N. O. & T. P. Ry. Co. be and it is hereby authorized to charge 10 cents per hundred pounds in excess of said '60 cent schedule' of rates, to-wit, to charge '70 cents per hundred pounds,' said extra 10 cents not being for the purpose of compensating said C. N. O. & T. P. Ry. Co. for services to be rendered to shippers from Cincinnati over said C. N. O. & T. P. Ry. to Chattanooga, but for the purposes above recited.

"Section 2: This Act shall take effect on and after the 1st day of July, 1912.

The extra cost to the shipper per car load by reason of fixing a "seventy cent schedule" rather than a "sixty cent schedule" on articles enumerated in Southern Classification No. 38-I. C. No. 15 (of which this court will take judicial notice) is illustrated by a few examples, as follows:

<i>First Class</i>	<i>Extra cost per car load.</i>
Boots and Shoes.....	\$20.00
Hats and Caps.....	20.00
<i>Second Class</i>	
Hardware.....	12.00
<i>Third Class</i>	
Furniture.....	15.60



<i>Fourth Class</i>	<i>Extra cost per car load.</i>
Safes, iron.....	33.60
Leather.....	63.60
<i>Fifth Class</i>	
Coffee.....	28.00
White Lead.....	42.00
Glass Bottles.....	42.00
Sugar.....	56.00
Lard.....	42.00
<i>Sixth Class</i>	
Farm Wagons.....	14.00

## VI.

### ARBITRARY POWERS EXERCISED BY COMMISSION VIOLATES CONSTITUTIONAL LIMITATIONS.

#### (a) The Pleadings.

The Bill of Complaint sets forth the following (under division IV, Bill of Complaint, paragraphs 34 to 37; Record Case No. 774, pp. 16-19), to-wit:

#### "IV

"(34) Your orators further show that said Commission in said case No. 1542 interpreted and applied the Act of Congress of the United States entitled "An Act to Regular Commerce" approved February 4, 1887 and the Acts amendatory thereof and supplementary thereto without regard to their terms and requirements and without regard to other statutes of the United States and without regard to the limitations imposed by the Constitution of the United States and the Amendments thereto, particularly the limitations imposed by Article V of the Amendments to the Constitution of the United States which provides:

“(a) ‘No person \* \* \* shall be deprived of \* \* \* property without due process of law.’

“(b) ‘Nor shall private property be taken for public use without just compensation.’

“(35) Your orators further show that the money which the parties aggrieved are required to pay to said C. N. O. & T. P. Ry. Co., under said schedules of rates, for the said transportation over its said road of any and all said shipments of said goods, wares and merchandise under said respective classes, made by parties aggrieved, from said city of Cincinnati, Ohio, to said City of Chattanooga, Tennessee, is property and private property, within the meaning of the fifth amendment to the Constitution of the United States.

“(36) Your orators further show that as set forth in paragraph (31) sub-paragraph (i), said Commission found that taking said railroad by itself and determining the reasonableness of said schedule of rates by reference to cost of construction, cost of maintenance, and profit upon the investment, complainants in said case No. 1542 had established their case, and that said schedule of rates ought fairly be reduced by as great an amount as was formerly found reasonable by said Commission; the rates so formerly found reasonable were as per schedule in cents per hundred pounds as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Rates</i> .....	60	54	40	30	24	22

and that said finding was a determination that said 60 cent schedule, afforded a reasonable return to said C. N. O. & T. P. Ry. Co. on its property employed in and devoted to the public use, and for the public convenience, and that said

60 cent schedule was a reasonable and just schedule of rates for the said transportation service performed by the said C. N. O. & T. P. Ry. Co. from said city of Cincinnati, Ohio, to the said city of Chattanooga, Tennessee.

“That the parties aggrieved, on any and all said shipments over said road of said goods, wares and merchandise made by said parties aggrieved, under said respective classes, from the city of Cincinnati, Ohio, to the city of Chattanooga, Tennessee, are deprived of their property without due process of law in this, to-wit: that notwithstanding said finding, said Commission, by its order, required said C. N. O. & T. P. Ry. Co. to establish on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for transportation over said road of said articles in the said numbered classes of the said Southern Classification, from Cincinnati, Ohio, to Chattanooga, Tennessee, not to exceed the following in cents per hundred pounds.

<i>Classes</i> .....	1	2	3	4	5	6
<i>Rates</i> .....	70	60	53	44	38	29

and thereby licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, **arbitrarily**, unconstitutionally, and unlawfully to take said private property of the parties aggrieved and to transfer the ownership thereof to the ownership and into the treasury of the said C. N. O. & T. P. Ry. Co., to the amount and extent of the differences between the said 60 cent schedule and the said 70 cent schedule of rates, in cents per hundred pounds, for the respective classes, as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Differences</i> .....	10	6	13	14	14	7

“That said differences between the said two schedules of rates, in cents per hundred pounds, namely:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Differences</i> .....	10	6	13	14	14	7

represent the amounts and value of said private property of the parties aggrieved which the said Commission by its said order licensed, empowered and authorized said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, **arbitrarily**, unconstitutionally and unlawfully take from the said parties aggrieved, and transfer the ownership of said private property to the ownership and into the treasury of the said C. N. O. & T. P. Ry. Co.

“That said C. N. O. & T. P. Ry. Co., by charging and collecting said 70 cent schedule of rates on any and all said shipments over said road of said goods, wares and merchandise under said respective classes, made by the parties aggrieved from Cincinnati, Ohio, to Chattanooga, Tennessee, and the authority given by said order of said Commission, to so take the private property of the parties aggrieved in the manner aforesaid, deprives said parties aggrieved of said private property unjustly, oppressively, **arbitrarily**, unconstitutionally and unlawfully, and therefore without due process of law, to the amount and extent of without due process of law, to the amount and extent of said differences, in cents per hundred pounds for said respective classes.

“Your orators further show that the parties aggrieved, on any and all said shipments over said road of goods, wares and merchandise, under said respective classes made by the parties aggrieved from said city of Cincinnati, O., to said city of Chattanooga, Tenn., are deprived of their property without due process of law in this, to-wit; that

said commission, by its order, licensed, authorized, and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, **arbitrarily**, unconstitutionally and unlawfully levy a tax upon the parties aggrieved to the amount and extent of said differences hereinbefore set forth; and said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, **arbitrarily**, unconstitutionally and unlawfully levy tribute on the parties aggrieved to the amount and extent of said differences hereinbefore set forth; and said Commission by its order licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, **arbitrarily**, unconstitutionally and unlawfully confiscate the said private property of the parties aggrieved to the amount and extent of said differences hereinbefore set forth; that said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to unjustly, oppressively, **arbitrarily**, unconstitutionally and unlawfully to make an enforced contribution to said C. N. O. & T. P. Ry. Co. to the amount and extent of said differences hereinbefore set forth; that said Commission by its said order, licensed, authorized and empowered said C. N. O. & T. P. Ry. Co. to levy and collect said tax, levy and collect said tribute, and confiscate and collect said amounts and enforce and collect said contributions for the use and benefit of said C. N. O. & T. P. Ry. Co. and its stockholders.

“(37) Your orators further show that the parties aggrieved, on any and all said shipments over said road of said goods, wares and merchandise made by said parties aggrieved, under the said respective classes, from said city of Cincinnati, Ohio, to the said city of Chattanooga, Tennessee, are required to pay to said C. N. O. & T. P.

Ry. Co. by said order of said Commission the following amounts of their private property for said transportation service in the said respective classes in cents per hundred pounds as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Rates</i> .....	70	60	53	44	38	29

and that for the said private property which the parties aggrieved pay to said C. N. O. & T. P. Ry. Co. under said 70 cent schedule of rates, said C. N. O. & T. P. Ry. Co. renders to said parties aggrieved compensation in the way of transportation services in exchange for said private property of said parties aggrieved, only to the extent of said 60 cent schedule of rates, in cents per hundred pounds, as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Rates</i> .....	60	54	40	30	24	22

"That said C. N. O. & T. P. Ry. Co. renders said parties aggrieved no compensation for their private property which they are required to pay said C. N. O. & T. P. Ry. Co. for said service on said respective classes, in excess of said 60 cent schedule of rates by the said order of said Commission, and said parties aggrieved are thus deprived of their private property without just compensation to the amount and extent of the difference between said 70 cent schedule of rates and said 60 cent schedule of rates, in cents per hundred pounds, for said respective classes, as follows:

<i>Classes</i> .....	1	2	3	4	5	6
<i>Differences</i> .....	10	6	13	14	14	7

The Bill of Complaint further alleges (Bill of Complaint, paragraph 51; Record Case No. 774, pp. 33-34):

"Your orators further show that in view of the uncontradicted fact that said 60 cent schedule of rates would make

more than due returns to said C. N. O. & T. P. Ry. Co., to-wit, 40.66 per cent. per annum, on the value of its property devoted to and employed in the public service and use and for the public convenience, that said Commission in violation of the limitations placed upon the exercise of its power, has required all shippers, including the parties aggrieved, to pay excessive freight rates from Cincinnati, Ohio, to Chattanooga, Tennessee, over the Cincinnati Southern **merely for the purpose of enabling some other road to make profits, and to enable some other road to maintain branches and to enable some other road to diffuse population and industries."**

**(b) Major and Minor Premise and Deductions.**

**(1) Money of a shipper paid, or to be paid, to an incorporated carrier maintaining and operating a railway under legislative sanction for services performed, or to be performed, by said common carrier, for the transportation of freight of said shipper over said railway of said common carrier, is property of said shipper and private property of said shipper, within the meaning and protection of the Fifth Amendment to the Constitution of the United States.**

**(2) Where such common carrier duly adopts, files and publishes as its schedule of rates the maximum schedule of rates prescribed in and pursuant to an order of the Interstate Commerce Commission which said order permits, licenses and authorizes such common carrier to charge such shipper such schedule of maximum rates for the transportation of said freight of said shipper over said railway, and which maximum so prescribed and so adopted, pub-**



lished and filed and purports and was intended to yield to said common carrier an UNDUE return AND FOR AN EXPRESSED PURPOSE OTHER THAN TO COMPENSATE SAID COMMON CARRIER FOR SERVICES RENDERED OR TO BE RENDERED, is to the extent that said maximum amounts to an UNDUE return the taking of the property of said shipper without due process of law and the taking of the private property of said shipper without just compensation.

(3) The Interstate Commerce Commission having found that a schedule of rates was unjust and unreasonable, in making an order requiring such common carrier to substitute therefor a new schedule of maximum rates, is bound by the limitations imposed by the Fifth Amendment to the Constitution of the United States. For said Interstate Commerce Commission to prescribe a new schedule of maximum rates, which maximum purported and was intended to yield to said common carrier an UNDUE return FOR A PURPOSE OTHER THAN TO COMPENSATE SAID COMMON CARRIER FOR SERVICES RENDERED OR TO BE RENDERED, is to the extent that such maximum amounts to an UNDUE return to authorize said common carrier to take the property of said shipper without due process of law and to take the private property of said shipper without just compensation. If said common carrier adopts said maximum as its schedule of rates and duly publishes same and duly files same with said Interstate Commerce Commission said carrier becomes bound in law to demand and said shipper be-



comes bound in law to pay said maximum rates, and upon such demand and payment the said common carrier takes said money of said shipper pursuant to said order authorizing said maximum and to the extent that said schedule of rates confessedly amounts to an UNDUE return AND FOR AN EXPRESSED PURPOSE OTHER THAN TO COMPENSATE SAID COMMON CARRIER FOR SERVICES RENDERED OR TO BE RENDERED, is the taking of the property of said shipper without due process of law and the taking of private property of said shipper without just compensation.

At common law a common carrier should not have exacted from a shipper more than a reasonable rate. This was well expressed by *Mr. Justice Brewer* in *Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Pacific Railway Co.* (May 24, 1897) 167 U. S. 479, where he said (at p. 494): "Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates subject to the regulations and restrictions, as well as to *that rule which is as old as the existence of common carriers, to-wit, that rates must be reasonable.*" *Mr. Justice Brewer* had already said in the *Nebraska Rate Case* (November 12, 1894), 64 Federal Reporter, 165 (at p. 176): "But the foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable." An unjust rate is an unreasonable rate; an unreasonable rate is an unjust rate; one term is a mere re-statement or paraphrase of the other.

Section 1 of the Act to Regulate Commerce of February 4, 1887 (24 Stat. 379), providing that **charges** for serv-

ices rendered or to be rendered by a particular carrier for the transportation of property "shall be reasonable and just, and every unjust and unreasonable charge for **such service** is prohibited and declared to be unlawful," was merely declaratory of the common law. In *Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Pacific Railway Co.* (also known as the *Maximum Rate Case*) (May 24, 1897), 167 U. S. 479, it was held that under the Act to Regulate Commerce of February 4, 1887 (24 Stat. 379), power was conferred upon the Interstate Commerce Commission to declare a rate unjust and unreasonable and to order a carrier to cease and desist from maintaining such rate, but that said act did not confer upon the Interstate Commerce Commission power to substitute in lieu thereof a just and reasonable rate. This led to the amendment of June 29, 1906 (34 Stat. 584), conferring upon the Interstate Commerce Commission power upon complaint and hearing to substitute a just and reasonable charge for the transportation service rendered or to be rendered by the particular carrier in lieu of the rate condemned by the Commission as unjust and unreasonable.

Section 6 of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379), amended March 2, 1889 (25 Stat. 855), and again amended June 29, 1906 (34 Stat. 584), provides (Anderson's Index Digest of Interstate Commerce Laws, p. 13): "No carrier, \* \* \* shall engage or participate in the transportation of \* \* \* property \* \* \* unless the rates \* \* \* and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater

or less or different compensation for such transportation of \* \* \* property \* \* \* between the points named in such tariffs than the rates \* \* \* and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates \* \* \* and charges so specified. \* \* \* Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars \* \* \* [and] in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both, such fine and imprisonment in the discretion of the court. \* \* \* Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to Regulate Commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agent, in any prosecution begun under this Act, shall be conclusively deemed to be the legal rate and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

The foregoing enumerated coercive, binding and mandatory provisions of the Interstate Commerce Act as amended have been repeatedly affirmed and applied by the Supreme Court of the United States and the Commission in the following cases:

*Texas & Pacific Ry. Co. vs. Mugg*, (1906) 202 U. S. 242.

*Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, (1907) 204 U. S. 426.

*Texas & Pacific Ry. Co. vs. Cisco Oil Mill*, (1907) 204 U. S. 449.

*Armour Packing Co. vs. United States*, (1908) 209 U. S. 56.

*American Express Co. vs. United States*, (1908) 212 U. S. 522.

*Poor vs. Chicago, Burlington & Quincy R. R. Co.*, (1907) 12 I. C. C. R. 488.

*Poor vs. Chicago, Burlington & Quincy R. R. Co.*, (1907) 12 I. C. C. R. 545.

### (c) Authorities

In *Adair vs. United States* (1908) U. S. 161, *Mr. Justice Harlan* calls attention to the fact that the power to regulate commerce is subject to the limitations contained in the federal constitution and the amendments thereto in the following language (at p. 180):

"We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the constitution."

The court then proceeded to declare Section 10 of the Erdman Act to be unconstitutional as in violation of the Fifth Amendment to the Constitution of the United States.

It has been repeatedly asserted in numerous cases that to take property **arbitrarily** or without compensation is to deprive a person of his property without due process

of law, and it will be sufficient to call the attention of the court to but a few recent ones as follows:

*Cleveland Electric Railway Co. vs. Cleveland & Forest City Ry. Co.* (1907) 204 U. S. 116.

*Atlantic Coast Line Co. vs. North Carolina Corporation Commission* (1907) 206 U. S. 1, at p. 20.

*Louisville & Nashville R. R. Co. vs. Central Stock Yards Company* (1909) 212 U. S. 132.

*Welch vs. Swasey* (1909) 214 U. S. 91.

*Monongahela Bridge vs. United States* (1910) 216 U. S. 177, at p. 178 and particularly at p. 195.

*Ballinger vs. Frost* (1910) 216 U. S. 240, at p. 241, and particularly at p. 249.

*Mo. Pacific Ry. Co. vs. Nebraska* (1910) 217 U. S. 196.

*Danville vs. Southern R. R. Co.* (1900) 8 I. C. C. R., 571, *Mr. Commissioner Prouty*, at p. 583.

#### (d) Deductions.

To fix such a schedule of rates so low that a common carrier would not receive a fair return upon the value of its property devoted to the public service is to deprive a common carrier of its property without due process of law; to purport to and expressly intend to **arbitrarily** fix a schedule of rates **which was expressly intended to make an UNDUE return to the carrier and for an expressed purpose other than compensation to the carrier** is to the extent of the excess to **arbitrarily** take the property of shippers. In other words, to compel the carrier to perform a transportation service without compensation or for inadequate compensation is to confiscate the property of the carrier; to arbitrarily give the carrier a return

*Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, (1907) 204 U. S. 426.

*Texas & Pacific Ry. Co. vs. Cisco Oil Mill*, (1907) 204 U. S. 449.

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**amounting to an UNDUE return and for an expressed purpose other than the compensation of the carrier** is to confiscate the property of the shipper to the amount of an **undue** return. If the avowed object and purpose of fixing a schedule of rates is to enable the carrier to earn excessive profits so as to benefit main line and branches of other carriers far removed from the place of the transportation service rendered or to be rendered is to confiscate the property of the shipper, to-wit, his monies, which are exacted from him in the *form* of compensation for services rendered but in fact for purposes ulterior and beyond and outside of and in no manner connected with compensation for services rendered or to be rendered. A mere statement of the proposition seems to bring its own answer that such an unblushing exaction for such purpose is to deprive shippers of their property without due process of law.

In the case at bar a majority of the Commerce Court ignored the fact that the schedule of rates had been **distinctly found to be "UNDUE"** by the Commission (Case No. 773, p. 81, stipulated into Case No. 774; Record Case No. 774, p. 90), and distinctly found by the Commission to be levied not for the purpose of compensating the C. N. O. & T. P. Ry. Co. but for the purpose of maintaining other carriers on other lines of railroad, both main line and branch lines, (numerous ones unprofitable) far removed from the place of performing the transportation service over the C. N. O. & T. P. Ry. Co. and to diffuse population and industries at such far destined points.

**It is an axiom of constitutional law that any ARBITRARY exercise of power is of itself a violation of Article V of the Amendments of the Constitution of the United States as requiring due process of law.**



If the L. & N. R. R. Co. has loaded itself down with unprofitable branch roads and if these unprofitable branches so deplete its treasury as to leave no returns in the way of dividends to its stockholders (which they do not, because the L. & N. regularly pays handsome dividends to its stockholders), the Commission is without power to authorize the L. & N. R. R. Co. to put unjust and unreasonable rates in effect simply that its stockholders may earn dividends. Nor has the Commission power to subject the public to unjust and unreasonable rates for the service rendered or to be rendered by the C. N. O. & T. P. Ry. Co. from Cincinnati, Ohio to Chattanooga, Tennessee in order that the L. & N. R. R. Co. might maintain rates higher than it otherwise could, simply that the L. & N. stockholders may earn dividends.

The Commission is without power to arbitrarily take the property and the private property of the parties aggrieved without due process of law and without just compensation in connection with the service rendered by the C. N. O. & T. P. Ry. Co. in order to protect the L. & N. R. R. Co. from its folly of loading itself down with unprofitable branch lines in order simply that the stockholders of the L. & N. R. R. Co. may earn dividends.

In *Covington & Lexington Turnpike Company vs. Sandford* (1896) 164 U. S. 578, Mr. Justice Harlan said (at pp. 596-597): "The public cannot properly be subjected to unreasonable rates in order, simply that stockholders may earn dividends. The Legislature has authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained

under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

## VII.

### REMEDY.

#### (a) Prayer to enjoin, set aside, annul and suspend order of Commission.

The Bill of Complaint contains a prayer (Bill of Complaint; Record Case No. 744, p. 53), as follows:

*"Third:* That said order of said the Interstate Commerce Commission in said case No. 1542 be suspended, set aside, annulled, and declared void and of no effect."

The Bill of Complaint contains the further prayer (Bill of Complaint; Record Case No. 774, p. 53) as follows:

*"Fifth:* That said defendant the Interstate Commerce Commission by mandatory injunction be required:

"(a) To set aside and annul said order in said case No. 1542."

The complainants in case No. 1542 asked the Commission to declare said 76 cent schedule of rates unjust and unreasonable and to substitute therefor a just and reasonable schedule of rates. If the court sustains our position that the Commission acted on powers not given to the Commission or that the Commission exercised its powers in such an unreasonable manner and in such an arbitrary way as to be within the shadow and not within the substance of its powers, or the Commission violated the limitations of the Constitution, the order of the Commission should be declared null and void even though the

Commission gave relief in part to the complainants in case No. 1542 before the Commission. If this court should annul the order of the Commission, it will leave the case open for further proceedings in accordance with the powers vested by law in the Commission. The very question of the power of the Commission is a judicial question which a shipper is entitled to have adjudicated, because it vitally affects his business in addition to the mere payment of a rate.

Cincinnati shippers were and are entitled to have their goods, wares and merchandise shipped to Chattanooga, Tennessee, at a just and reasonable rate. This right to have their goods transported to Chattanooga, Tennessee so transported is a valuable right.

*McLean vs. Denver & Rio Grande R. R. Co.* (1906) 203 U. S. 38.

This right of the Cincinnati shippers is immediate, as well expressed by *Mr. Justice McKenna* in *Illinois Central R. R. Co. vs. Interstate Commerce Commission* (1907) 206 U. S. 441 (at p. 463) as follows:

"His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service."

In *Southern Pacific Terminal Co. vs. Interstate Commerce Commission* (February 20, 1911) 219 U. S. 498, *Mr. Justice McKenna* said (at p. 515):

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consider-

ation ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

To deny relief in the case at bar would be to sanction and justify the exercise of any power which the Commission might assume to exercise provided it made some reduction in the rate, no matter how small and how inadequate, and no matter how shadowy.

**(b) Other and further equitable relief.**

The other prayers contained in the Bill of Complaint are of course dependent upon this court granting the relief of suspending, setting aside, annulling, declaring void and of no effect the order of the Commission in case No. 1542. If this court grants the prayer to suspend, set aside, annul, and declare void and of no effect the order of the Commission in case No. 1542, the granting the other prayers would then be subject of consideration so that the complainants might have complete relief.

The case of *Southern Ry. Co. vs St. Louis Hay & Grain Co.* (1909) 214 U. S. 297, was an action on an award by the Interstate Commerce Commission. The court (at p. 302) remanded the case to the Interstate Commerce Commission for further investigation and<sup>7</sup> report.

See dissenting opinion in the case at bar for order (188 Fed. Rep. 255 lines 1 to 20 from bottom of page).

**VIII.  
IN CONCLUSION.**

A reading of the opinion of a majority of the Commerce Court in the case at bar (188 Fed. Rep. 242, at p. 247, lines 3 to 7 from top: at p. 247, lines 10 to 16 from bottom; p.

248, lines 16 to 21 from top; and p. 253, lines 27 to 30 from top) might lead to the inference that a majority of the Commerce Court rested under the belief that an order of The Interstate Commerce Commission could only be declared null and void on a constitutional question. This opinion did prevail at one time in some Circuits but was exploded by The Supreme Court of the United States in 1910 by *Mr. Chief Justice White* (then *Mr. Justice White*) in *Interstate Commerce Commission vs. Illinois Central Railroad Co.*, 215 U. S. 452 at page 470 and reiterated by *Mr. Chief Justice White* in *Southern Pacific Railroad Co. vs. Interstate Commerce Commission* (Popularly known as the *Willamette Valley Case*) (Feb. 20, 1911) 219 U. S. 433 at p. 442. There are nine (9) instances in which the Supreme Court of the United States will declare null and void an order of The Interstate Commerce Commission (only one of which is a constitutional question) and these have been enumerated in this brief with numerous decisions of the Supreme Court of the United States in support thereof. (This brief pp. 72-74). *A majority of the Commerce Court do not cite or refer to a single one of these cases.*

We did not ask the Commerce Court to substitute its judgment for the judgment of the Commission, but to set aside an order based on the exercise of power not possessed by the Commission and in violation of limitations on such power so that we may apply at once to the Commission to decide Case No. 1542 in accordance with the powers conferred on it and all proper limitations thereon.

We did not ask the Commerce Court to substitute its judgment for the judgment of the Commission, but to set aside an order based on the exercise of power not possessed by the Commission and in violation of limitations on such

power so that we may apply at once to the Commission to decide Case No. 1542 in accordance with the powers conferred on it and all proper limitations thereon.

It is submitted that the proper order to be entered in this case is the one indicated in the dissenting opinion of *Judge Archbald*, concurred in by *Judge Mack* (188 Fed. Rep. 255) as follows:

"The order of the Commission, being based upon mistaken and erroneous grounds, is therefore invalid and should be so declared. *Southern Railway vs. St. Louis Hay & Grain Co.* 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004; *Inter. Com. Com. vs. Stickney*, 215 U. S. 98, 30 Sup. Court, 66, 54 L. Ed. 112; *Southern Pacific Ry. vs. Inter. Com. Com.*, 219 U. S. 498, 31 Sup. Court, 279, 55 L. Ed. —. And the case should be remanded in consequence to the Commission in order that a rate may be fixed which shall be just and reasonable **as respects the respondent carrier by whom the services are to be performed.** This does not take from the Commission the right to say what that rate shall be. Much less does it involve the determination of the rate by the court. It merely disposes of the rate which has been mistakenly made, as preliminary to a new consideration of it by the Commission upon correct and proper grounds. *Cin. N. O. & T. P. Ry. vs. Inter. Com. Com.*, 162 U. S. 184, 238, 239, 16 Sup. Court, 700, 40 L. Ed. 935; *Southern Railway vs. St. Louis Hay & Grain Co.* 214 U. S. 297, 29 Sup. Court 678, 53 L. Ed. 1004."

The Bill of Complaint in the case at bar fully sets forth the merits of this case. We submit that a majority of the Commerce Court erred in sustaining a demurrer thereto and dismissing same and that the appeal should

be sustained, the demurrer over-ruled and this court should grant the prayer of the Bill of Complaint and enter an order as indicated by *Judge Archbald* and *Judge Mack* in their dissenting opinion. (188 Fed. Rep., p. 255, lines 1-20 from bottom of page).

Respectfully,

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*Of Counsel.*

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*January 2nd, 1912.*

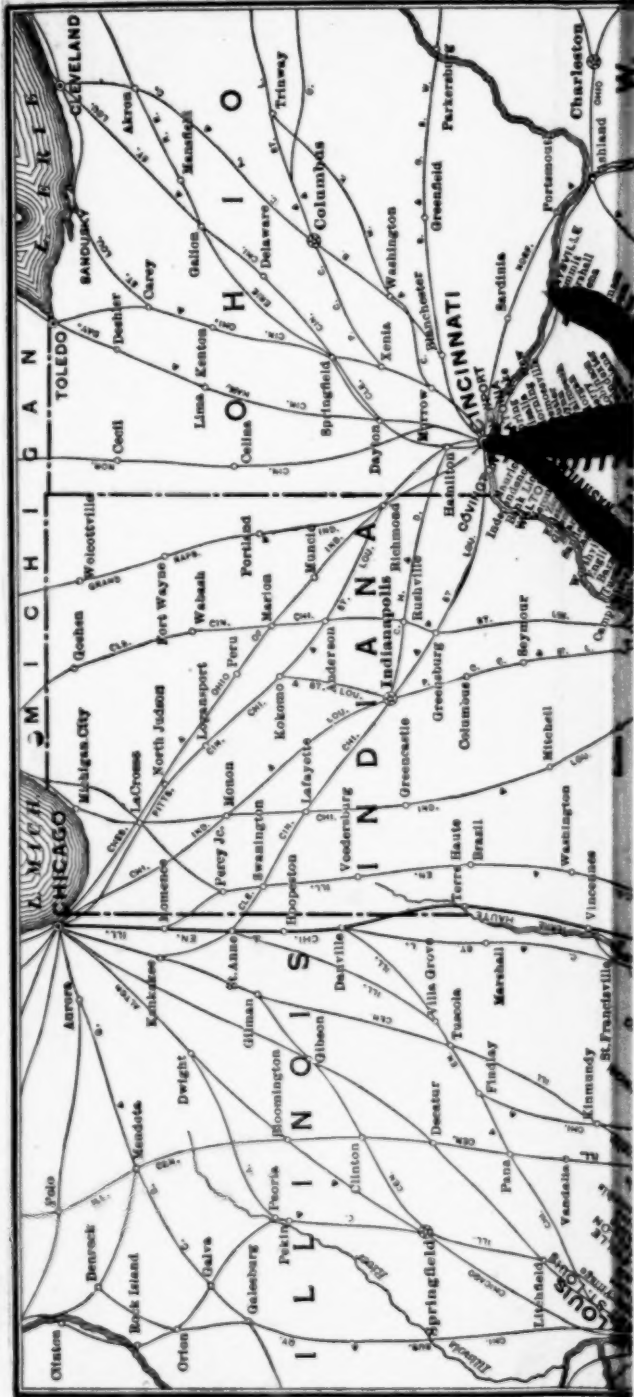
*Solicitors.*

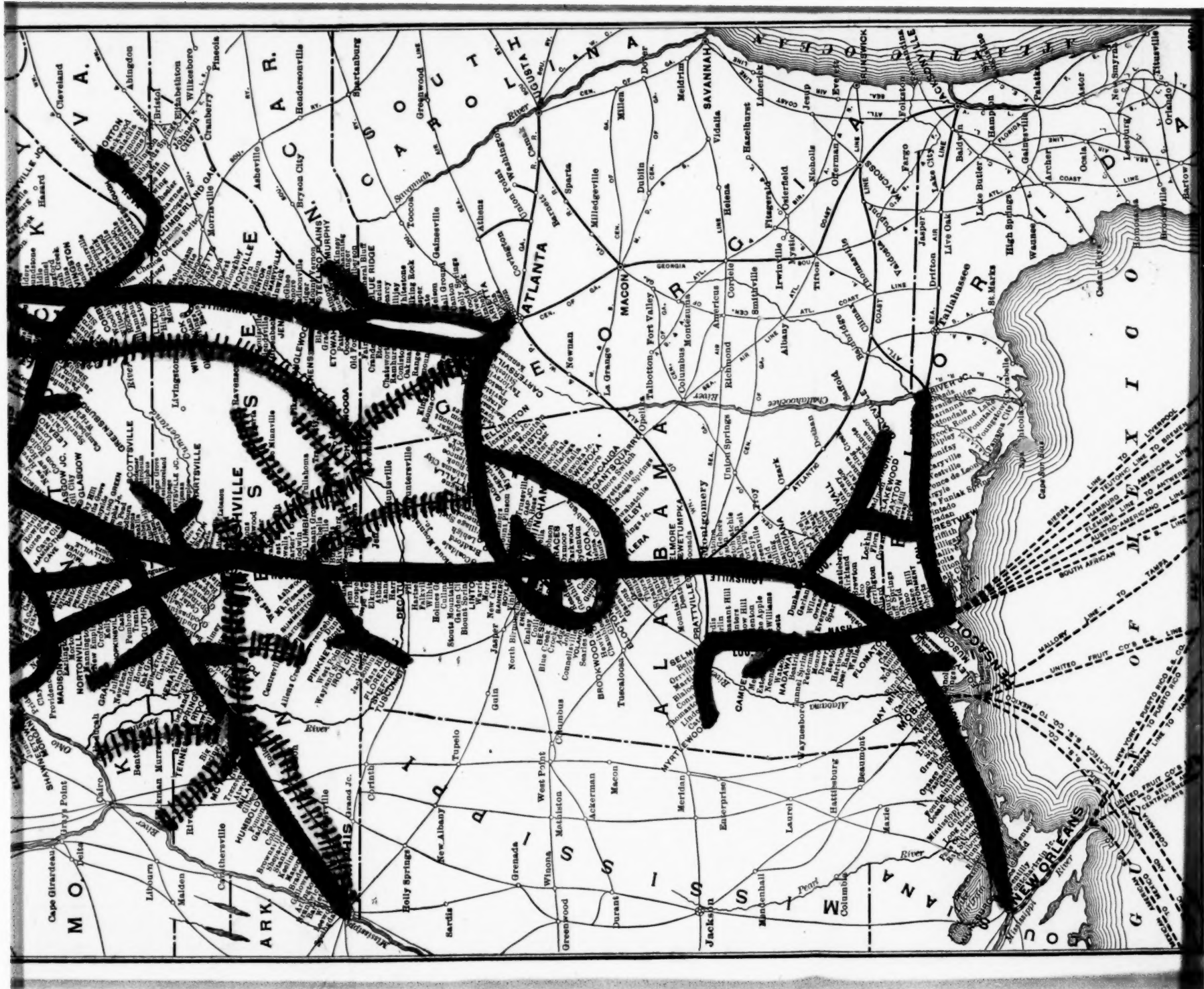




# EXHIBIT B.

Exhibit B this Brief is also Exhibit B embodied in and made part of Bill of Complaint cases No. 773 and 774—Record case No. 773, page 95, Stipulated into case No. 774, Record case No. 774, page 90.







10  
Office Supreme Court, U. S.

FILED.

JAN 11 1912

JAMES H. MCKENNEY,

CLERK.

IN THE

## Supreme Court of the United States

JAMES J. HOOKER, ET AL., *Appel-*  
*lants,*

*vs.*

MARTIN A. KNAPP, ET AL., *Ap-*  
*pellees.*

} October Term, 1911.  
No. 773.

THE EAGLE WHITE LEAD CO.,

ET AL., *Appellants,*

*vs.*

THE INTERSTATE COMMERCE COM-  
MISSION, ET AL., *Appellees.*

} October Term, 1911.  
No. 774.

### REPLY BRIEF ON BEHALF OF APPELLANTS.

[APPEAL FROM DECISION COMMERCE COURT (VOTE OF  
3 TO 2) SUSTAINING DEMURRER TO BILL OF COM-  
PLAINT, CASES 5 AND 6, CONSOLIDATED 188 FED. REP.,  
242 AND 256.]

FRANCIS B. JAMES,  
*Of Counsel.*

LITTLEFORD, JAMES, BALLARD, FROST & FOSTER,  
Nos. 1002-3-4-5 First National Bank Bldg.,  
Cincinnati, Ohio.  
Nos. 805-6-7-8 Westory Building,  
Washington, D. C.  
*Solicitors.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1911.

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No. 773.

JAMES J. HOOKER, ET AL., *Appellants*,  
*v.*

MARTIN A. KNAPP, ET AL., *Appellees*.

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No. 774.

THE EAGLE WHITE LEAD COMPANY, ET AL.,  
*Appellants*,

*v.*

THE INTERSTATE COMMERCE COMMISSION, ET AL.,  
*Appellees*.

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**REPLY BRIEF ON BEHALF OF  
APPELLANTS.**

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**I.**

**A SHIPPER HAS EQUAL RIGHTS  
WITH A RAILROAD CORPORATION  
TO BRING A BILL IN EQUITY TO AN-  
NUL AN ORDER OF THE INTERSTATE  
COMMERCE COMMISSION.**

Mr. R. Walton Moore, in his brief on behalf of  
the C. N. O. & T. P. Ry. Co. (pp. 46-52) claims that  
the Commerce Court was without jurisdiction.

It seems to be contended that a shipper has not an equal right with a railroad corporation to file a bill in equity to annul an order of the Interstate Commerce Commission. This contention will be answered under three heads:

(1) The right of a carrier, or shipper, to file a bill in equity to enjoin an order of the Interstate Commerce Commission exists independent of, and does not arise out of any statute.

(2) The United States Circuit Court was given jurisdiction of such actions.

(3) The venue of such actions was prescribed as in the district wherein the carrier has its principal operating office.

### (1)

**The right of a carrier, or shipper, to file a bill in equity to enjoin an order of the Interstate Commerce Commission exists independent of, and does not arise out of any statute.**

This proposition seems to be settled in the case of *Peavey v. Union Pacific Railway Company* (March 3, 1910), 176 Fed. Rep., 409, wherein it was stated by *Circuit Judge Sanborn* and concurred in by *Circuit Judges Hook and Adams* (415-418) as follows, to wit:

“The interstate commerce act authorizes incorporated boards of trade of cities and associations of like character to apply to the commission for relief (24 Stat., 383, Sec. 13), and such corporations and members representing

such associations may likewise apply to the court for relief from injuries unlawfully inflicted by the commission.

“Thereupon **Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale**, the president, secretary and chairman, respectively, of the transportation committee of, and who were authorized to represent, the **Board of Trade of Kansas City**, which is an association of 200 members consisting of operators of grain elevators, millers, and dealers in grain who handled a total of 11,334,050 bushels of grain of the value of \$70,739,930 in the year 1907, the **Omaha Grain Exchange**, a corporation whose members are engaged in the same business and interested in this order in the same way at Omaha, the **St. Joseph Board of Trade**, a corporation, and certain individuals representing the **Atchison Board of Trade**, exhibited their bill against the Commission, wherein they set forth the material facts which have been recited, alleged that this order of the Commission was violative of the Constitution, beyond the powers of the Commission, and that its enforcement would depreciate the value of their elevators and their investments in these and other facilities, for the transfer, purchase, and sale of grain in their cities by depriving them of compensation for its transfer, would draw away from their cities to eastern, northern, and southern marts a large volume of their grain business, and would tend to diminish the grain markets in their cities to their irreparable injury, and prayed for equitable relief. The Commission demurred to this bill, and the argument

on the demurrer was submitted at the final hearing of these cases. \* \* \*

"The demurrer to the bill of Diffenbaugh and his associates presents two objections: That the complainants were not parties to the proceeding before the Commission upon which the order challenged is based; and that there is no equity in the bill. But this is a controversy between competitors in transportation and in trade, between the Traffic Bureau of St. Louis and the owners of the lines of railroad which extend from the grain fields of Kansas and Nebraska through the Missouri River cities upon one side, and the Boards of Trade, the owners of elevators and dealers of grain in the Missouri River cities and the railroad companies whose termini are at those cities on the other. The former are interested in opposition to the transfer of grain at those cities and to any allowance therefor; the latter are interested to promote the transfer of grain in those cities and to secure an allowance therefor. One of the parties opposed to this transfer, upon notice to other parties who are equally opposed to it, and without any notice to any party in favor of it, has procured this final order of the Commission, which prohibits the railroad companies from making any allowance for the elevation, necessarily deteriorates the value of the property, diminishes the volume and the profit of the business, strikes down profitable contracts, and destroys the right of parties in favor of the transfer to make such contracts. These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding or to be notified of the hearing

before the Commission upon which this order is founded? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order, because none of their interests are irreparably or at all injured, and, if those whose interests are injuriously affected may not assail it, the order is impregnable.

"This cannot be the true rule of right or of practice. A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine such suits' is vested in the Circuit Courts. Section 16, as amended (34 Stat., 592, U. S. Comp. St. Supp. 1909, p. 1162). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a federal court of equity for relief. Such an order, issued without notice to the parties injuriously affected and without opportunity to them to present meritorious defenses, is not more conclusive than a judgment of a court, and *Chief Justice Marshall* declared

in *Marine Insurance Company v. Hodgson*, 7 Cranch. 332, 336, 3 L. Ed. 362, that:

“Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, and of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.” *Hendrickson v. Hinckley*, 17 How., 443, 444, 15 L. Ed. 123; *Hungerford v. Sigerson*, 20 How. 156, 161, 15 L. Ed. 869; *Gaines v. Fuentes*, 92 U. S., 10, 22, 23 L. Ed. 524; *Barrow v. Hunton*, 99 U. S., 80, 85, 25 L. Ed. 407; *Johnson v. Waters*, 111 U. S., 640, 667, 4 Sup. Ct., 619, 28 L. Ed., 547; *Arrowsmith v. Gleason*, 129 U. S., 86, 97, 98, 9 Sup. Ct., 237, 32 L. Ed., 630; *Marshall v. Holmes*, 141 U. S., 589, 596, 12 Sup. Ct., 62, 35 L. Ed., 870; *National Surety Company v. State Bank*, 120 Fed., 593, 598, 56 C. C. A., 657, 662, 61 L. R. A., 394.

“The complainants in the Diffenbaugh case are entitled to challenge the order of the Commission in this court. The allegations in their bill that this order was beyond the power of the Commission and will irreparably injure their property and their business present good ground for equitable relief, and the demurrer of the Commission must be overruled. For the same reasons, the petitions of the railroad companies that seek to intervene present substantial equities and their motion for leave to file them and to become parties to this suit must be granted.

“The Interstate Commerce Commission is an administrative tribunal, and the wisdom and expediency of the lawful exercise of the discretion delegated to it under the Constitution and the statutes is not reviewable by the courts. But the power is vested in and the duty is imposed upon the Circuit Courts to relieve from orders of the Commission which deprive complainants of their property without due process of law or take it without just compensation in violation of the fifth amendment to the Constitution, from orders which are beyond the limits of the power delegated by the acts of Congress to the Commission and from orders which, though in form within its delegated power, evidence so unreasonable an exercise of it that they are in substance beyond it. *Interstate Commerce Commission v. Illinois Central Railroad Company* (Jan. 10, 1910), 215 U. S., 452, 30 Sup. Ct., 155, 54 L. Ed. —; *Interstate Commerce Commission v. Stickney* (Nov. 29, 1909), 215 U. S., 98, 30 Sup. Ct., 66, 54 L. Ed. —; s. c. (C. C.) 164 Fed., 638, 644; *Missouri, Kansas & Texas Ry. Co. v. Commission* (C. C.), 164 Fed., 645, 648.”

This was affirmed in *Interstate Commerce Commission v. Diffenbaugh* (Nov. 13, 1911), 222 U. S., 42, at p. 49.

Parties complainant and jurisdiction in cases No. 773 and No. 774 have already been briefly alluded to in our main brief (pp. 53-58).

Section 13 of the Act to Regulate Commerce of February 4, 1887 (Anderson's Index Digest of Interstate Commerce Laws, pp. 38-39) provides that:



“*Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society \* \* \** complaining of anything done or omitted to be done by any common carrier \* \* \* may apply to said Commission by petition.”

This same section further provides (Anderson's Index Digest of Interstate Commerce Laws, p. 40):

“No complaint shall at any time be dismissed because of the *absence of direct damage to the complainant.*”

It is therefore apparent that the Act to Regulate Commerce vested a right in either a person, mercantile society or a manufacturing society to file a complaint although such person or manufacturing society suffered no direct damage.

As well pointed out by *Judge Archbald* in *Procter & Gamble Co. v. United States* (1911), 188 Fed. Rep., 221, at pp. 226-227 to give a railroad corporation such right and deny it to a shipper would render the law unconstitutional as wanting in due process of law.

Section 16 of the Act to Regulate Commerce of February 4, 1887, as amended March 2, 1889, and again amended June 29, 1906 (Anderson's Index Digest of the Interstate Commerce Laws, p. 52) provides as follows:

“The *venue* of suits brought in any of the *Circuit Courts of the United States* against the Commission to enjoin, set aside, annul, or sus-

pend *any* order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where such carrier has its principal office; **and jurisdiction to hear and determine such suits is hereby vested in such courts."**

In the case at bar the Commission did make an order against the C. N. O. & T. P. Ry. Co. The C. N. O. & T. P. Ry. Co. has its principal operating office in the Southern District of Ohio, Western Division. This suit was brought in the Circuit Court of the United States for that district. The act expressly provides in such case that "jurisdiction to hear and determine *such* suits is hereby vested in *such* courts." So far as cases No. 773 and No. 774 are concerned, therefore, they fall within the *express language* of this section.

Properly construed, any order of the Commission which "touches" a carrier is an order against the carrier. This section when it speaks of an order against a carrier, does not only mean an order adverse to the carrier, because an order might be to the advantage of a carrier and still an order against the carrier when the word "against" is properly construed.

The Act to Regulate Commerce was a remedial statute and Section 16 of the Act to Regulate Commerce and amendments thereto was peculiarly a remedial section and should be liberally construed. Taking the statutes *in pari materia* and the context in which the word "against" is used and the general intent underlying the statute and the absurd consequences of giving the statute any other construction, it is quite clear that the word "against" as used in this section as amended aforesaid means "in reference to" or "concerning" or "touching" a carrier. To give the word "against" the narrow meaning of meaning merely "adverse" would be to destroy the whole general intent and purpose of the statute.

To give the word "against" the meaning of "touching" or "concerning" or "in reference to" brings the whole of Section 16 of the Act to Regulate Commerce into harmony with all other statutes on the same subject matter, prevents absurd consequences flowing therefrom, and preserves the whole general intent and purpose of Congress. In addition, it gives that liberal construction to sustain a remedy which is always given to a remedial statute.

In *Silver v. Ladd* (1869), 7 Wall. 219, the Supreme Court of the United States in an opinion delivered by *Mr. Justice Miller* (in which the whole court concurred), the words "single man" were construed to include "an unmarried woman."

In *Seabright v. Seabright* (1886), 28 W. Va., 412, at p. 415, the twelfth proposition of the syllabus is as follows:

"This statute as well as the section 25 of ch. 130 of the Code in providing, that no party as to certain transactions shall be examined *against* certain other persons, does not mean by *against* on opposite sides of a suit **but as having opposing interests** in the suit whether on the same side as co-plaintiffs or co-defendants or on opposite sides as plaintiffs and defendants."

*Mr. Justice Green*, who delivered the opinion of the court, said (p. 465) as follows:

"But in construing the statute under consideration we must disregard, *as was done in the case of Martin v. Smith*, 25 W. Va., 587, such technical construction and hold, that *against* in this statute does not mean on opposite sides of a suit **but as having opposite interests in the suit**, though the administrator, executor, heir at law, etc., may happen to be on the same side nominally as plaintiff or as defendant in a chancery cause *or may in fact be identically the same person.*"

## (2)

### The United States Circuit Court Was Given Jurisdiction of Such Actions.

The amount involved is not an element of jurisdiction and the Bill of Complaint would have been equally good if it had made no reference to the amount involved or if the Bill of Complaint had alleged that the amount involved was more than five

dollars instead of as it did more than two thousand dollars.

In case 773 the Bill of Complaint (Paragraph I, Record Case No. 773, p. 2) does, however, expressly allege: "That the matter and amount in dispute exceed, exclusive of interest and costs, the sum and value of two thousand (\$2,000) dollars."

In case 774 the Bill of Complaint (Paragraph I, Record Case No. 774, p. 2) does, however, expressly allege: "That the matter and amount in dispute exceed, exclusive of interest and costs, the sum and value of two thousand (\$2,000) dollars."

In the case at bar the order of the Commission sought to be annulled is a single thing or entity in which the plaintiffs had a common interest. This is settled in the case of *Troy Bank v. White Head Company* (Nov. 6, 1911), 222 U. S., 39, wherein Mr. Justice Van Devanter said (at pp. 40-41)

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Shields v. Thomas*, 17 How., 3; *Rodd v. Heartt*, 17 Wall., 354; *Davies v. Corbin*, 112 U. S., 36, 40; *Gibson v. Shufeldt*, 122 U. S., 27; *New Orleans Pacific Railway Co. v. Parker*, 143 U. S., 42; *Walter v. Northeastern Railroad Co.*, 147 U. S., 370, 373; *Davis v. Schwartz*, 155 U. S., 631, 647;

*Illinois Central Railroad Co. v. Adams*, 180 U. S., 28.

"The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. Thus, while their claims under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes."

**Be this as it may a defect, if any, was cured by an order permitting an amendment** to the bill of complaint (Record Case No. 774, p. 65), as follows, to wit:

"This cause came on to be heard upon motion of petitioners through their counsel and solicitors to amend the original bill of complaint paragraph 1 by inserting the words 'as to each complainant' after the word 'costs,' the court having considered the same and being of the opinion that petitioners have a right to so amend under Rule 29 In Equity, does hereby order and decree that petitioners be permitted to so amend their bill and said words are to be treated as inserted in the bill of complaint."

If Section 16 of this statute as amended is to be construed, then in order to gather the general intention or general purpose of Congress as contained in

Section 16 as amended it is necessary to consider all statutes *in pari materia*.

Under the Judiciary Act of 1789 as amended (United States Compiled Statutes, 1901, Volume I, p. 508) the Circuit Courts of the United States were given original jurisdiction *concurrent* with the courts of the several States in *actions arising under the Constitution or laws of the United States* in which the matter in dispute, exclusive of interest and costs, *exceeded* the sum and value of two thousand dollars, and venue was placed in the district wherein the *defendant was an inhabitant*. It will therefore be seen that where the amount in dispute, exclusive of interest and costs, was two thousand dollars or less, exclusive jurisdiction was vested in State courts; and where it exceeded that amount the plaintiff could elect whether he would proceed in a State court or in a federal court. It will also be noticed that it was necessary to sue the defendant in the district wherein the defendant was an "inhabitant." This has been construed to mean in the case of a corporation the State under the laws of which the company was incorporated. It will be noticed that under Section 16 of the Act to Regulate Commerce, amended as aforesaid, that the suits spoken of are "suits against the *Commission*." The Commission, therefore, is the *necessary* party defendant and the common carrier is merely added as a *proper* party defendant where there may be some *ancillary* relief against the common carrier. It was clearly the intention of Congress in passing said Section 16

of the Act to Regulate Commerce, as amended, to take jurisdiction away from State courts and not to make the jurisdiction depend upon the amount involved and not to make the venue of the court depend upon the inhabitancy or citizenship of the defendant, because it will be noticed by said Section 16 of the Act to Regulate Commerce, as amended, that it speaks of suits "*against the Commission.*" The act therefore speaks of suits "against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission," and then said Section further expressly and specifically provides **"and jurisdiction to hear and determine such suits is hereby vested in such courts."**

It is therefore clearly apparent that in the first place it was the intention of Congress in passing said Section 16 of the Act to Regulate Commerce, as amended, as to suits to annul an order of the Commission, the jurisdiction should be vested in the United States Circuit Courts and to exclude jurisdiction in State courts, either exclusive jurisdiction where the amount involved was less than two thousand dollars or concurrent jurisdiction where the amount involved was more than two thousand dollars.



## (3)

**The Venue of Such Actions Was Prescribed as in the District Wherein the Carrier Has Its Principal Operating Office.**

If it were the intention of Congress to exclude jurisdiction at the place of inhabitancy of the Commission in suits against the Commission it then became necessary for Congress to prescribe a venue. It was therefore the intention of Congress to prescribe a venue as in the Circuit Courts of the United States **in the district** where the carrier in reference to whom such order or requirement may have been made **had its principal operating office**. *It will be noticed that this language has reference exclusively to venue.*

**II.****APPLICATION FOR REHEARING NOT SOLE OR ADEQUATE REMEDY.**

Mr. R. Walton Moore in his brief on behalf of the C. N. O. & T. P. Ry. Co. (at p. 52) seems to contend that the only relief to the shipper against the effect of an order of the Commission reached by a misconception of the law, an erroneous application of the law, the exercise of powers not conferred upon the Commission, the arbitrary action of the Commission, ruling of Commission in form within delegated powers but authority in fact exercised on assumption of power not delegated to Commission or when

Commission purports to act for laudable and equitable purposes within the form of power but beyond its power or when administrative power exercised and manifested in such an unreasonable manner that administrative ruling within the shadow and not within the substance of the authority given (main brief, pp. 72-74) that the sole relief of the shipper is by an application for a rehearing when he says (his brief, p. 52): "This would not prevent the shippers from resorting to the Commission at all times."

Case No. 1542 before the Commission was really and in effect a rehearing of case No. 322 before the Commission. (Record Case No. 774, pp. 4 and 15.)

The Act to Regulate Commerce of February 4, 1887, as amended, however, does not make an application for rehearing the only remedy for carrier or shipper or affect the right to have a void order duly declared null and void by a court of equity.

Section 15 of the Act to Regulate Commerce of February 4, 1887, as amended June 29, 1906 (Anderson's Index Digest of Interstate Commerce Laws, p. 43) provides that the order shall continue in force not exceeding two years unless suspended, modified or set aside by the Commission, or suspended **or set aside by a court of competent jurisdiction.** The complainants in cases No. 773 and No. 774 have elected to seek the relief by a court during the continuance of the order which the Commission fixed at two years.

The fallacy of the position of the counsel for the

C. N. O. & T. P. Ry. Co. is apparent when we consider that the process of rehearing is unending because at a rehearing it is a mandatory duty on the Commission to consider all facts *including those arising since the former hearing*. (Anderson's Index Digest, p. 56, lines 6 and 7 from bottom of page.) By Section 16 (Anderson's Index Digest, p. 52) a suit may be brought "at *any time*" (no matter how short) "after such order is promulgated." In the case at bar complainants are satisfied with the facts and with the findings of fact and the conclusions of fact, but are complaining that the Commission in making its order and requirements considered that it possessed powers not conferred upon it by the Act to Regulate Commerce of February 4, 1887, and amendments thereto.

In other words, the contention of the complainants is that the order is absolutely null and void upon the Commission's own finding of facts and the admitted facts in the case and with which findings of fact and conclusions of fact the complainants are satisfied but merely dissatisfied because the order was based upon the application thereto of powers not possessed by the Commission. The complainants would not know what to say in a petition for rehearing, and in addition, the Commission divided itself into two hostile camps, one asserting the possession of a power which was denied by the other.

It is also to be borne in mind that in practice the word "rehearing" does not mean re-argument.

The common carriers have put this practical interpretation on this statute because the common car-

riers seek more frequently to annul a void order by a proceeding in court rather than by asking for a rehearing.

### III.

#### TIME OF BRINGING SUIT.

Mr. R. Walton Moore, in his brief on behalf of the C. N. O. & T. P. Ry. Co. (pp. 50-52), seems to raise a question as to the time in which an action may be brought to annul a void order of the Commission.

The Bill of Complaint contains a prayer (Bill of Complaint, Record Case No. 774, p. 53) as follows:

“*Third.* That said **order** of said the Interstate Commerce Commission in said case No. 1542 be suspended, set aside, annulled and declared void and of no effect.”

This follows the language of Section 16 of the Act to Regulate Commerce of February 4, 1887, as amended March 2, 1889, and again amended June 29, 1906 (Anderson's Index Digest of Interstate Commerce Laws, p. 52).

The Bill of Complaint contains the further prayer (Bill of Complaint, Record Case No. 774, p. 53) as follows:

“*Fifth.* That said defendant, The Interstate Commerce Commission, by mandatory *injunction* be required:

(a) To set aside, and annul said **order** in said case No. 1542.”

This is pursuant to the same Section 16 as amended.

Attention is called to the language of this section, which is:

- (1) To enjoin any order;
- (2) To set aside any order;
- (3) To annul any order; or
- (4) To suspend any order.

This section as amended thereupon provides as to *when* the suit may be brought by expressly providing that such suit "may be brought **at any time after such order** is promulgated."

The only possible limitation of time might arise from Section 15 of the Act to Regulate Commerce of February 4, 1887, as amended June 29, 1906 (Anderson's Index Digest of Interstate Commerce Laws, p. 43), which provides that all orders of the Commission shall continue in force not exceeding two years unless they be suspended or set aside. That such a suit is one to declare void an **order** of the Commission was alluded to in the case of *Minneapolis v. R. R. Co.* (1908), Wisconsin Commission Reports (for the year 1908), p. 528 at pp. 529-530, fourth proposition of the syllabus. **This is not a suit to enjoin a rate.** The Commission by its order prescribed a maximum 70-cent schedule of rates and the railroad company instead of contesting the order of the Commission duly filed a 70-cent schedule of rates. **This suit is not brought to enjoin this schedule of rates but to have a void order duly declared void by the judgment of a court of equity.**

## IV.

**A SCHEDULE OF RATES MUST BE JUST AND REASONABLE HAVING REGARD TO THE SERVICE RENDERED BY THE CARRIER THAT IS TO PERFORM IT.**

That a schedule of rates must be just and reasonable, having regard to the service rendered by the carrier that is to perform it, is the clear mandate of the Act to Regulate Commerce as interpreted, construed and applied by the Courts.

Section 1 of the Act to Regulate Commerce of February 4, 1887, as amended June 29, 1906 (Anderson's Index Digest of the Interstate Commerce Laws, p. 4) provides among other things as follows:

**"All charges made for any service rendered or to be rendered** in the transportation of passengers or property as aforesaid, or in connection therewith, *shall be just and reasonable*; and *every unjust and unreasonable* charge for **such service** or any part thereof is prohibited and declared to be unlawful."

In the *Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S., 443) Mr. Chief Justice White said (at p. 441):

"It was alleged [by the **Southern Pacific Railroad Company**] that the Commission, in setting aside the increased tariff rate of \$5 and fixing substantially the old rate, had exceeded the powers conferred upon it by law,

because it did not act in the exercise of the authority conferred upon it to determine whether **a rate was just and reasonable in and of itself with regard to the service rendered** but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers."

And again (at p. 442):

"In the argument at bar the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject, and if it finds **the rate complained of is in and of itself unreasonable, having regard to the service rendered**, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years."

And further again (at p. 451):

"But upon the theory that the order was made merely as the result of **the exercise of the statutory power to prevent the charging of an unreasonable and unjust rate, having regard to the service rendered**, the inconsequence of the reasoning stated becomes at once patent."

In the case at bar *Judge Archbald* in his dissenting opinion concurred in by *Judge Mack* (188 Fed. Rep., 255) listened to the mandate of the statute, and gave ear to the foregoing language of *Mr. Chief Justice White* in the *Willamette Valley Case* in interpreting, construing and applying the same as follows:

**"The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service** is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just, by the consideration of what some other road, not so favorably situated, may need."

(a)

**"76 cent schedule"**

In the case at bar the "76 cent schedule" of rates complained of was as follows:

Classes	1	2	3	4	5	6
Cents per 100 pounds . . . .	76	65	57	47	40	30

**This schedule was condemned by the unanimous vote of the Commission as unjust and unreasonable** and is therefore removed from discussion and any presumption that might have attached thereto completely removed. A



majority of the Commerce Court in the case at bar (188 Fed. Rep., 255) entirely overlooked this fact in speaking of the presumption that all rates established in accordance with law are presumed to be just and reasonable. They should have qualified this expression by adding: "Unless condemned as unjust and unreasonable by the Interstate Commerce Commission." **In the case at bar the "76 cent schedule" of rates was unanimously condemned by the Interstate Commerce Commission as unjust and unreasonable.**

(b)

**"60 cent schedule"**

A "60 cent schedule" of rates was as follows:

Classes	1	2	3	4	5	6
Cents per 100 pounds.....	60	54	40	30	24	22

This 60 cent schedule of rates was held by the unanimous vote of the Commission in the case at bar to be a just and reasonable schedule of rates in and of itself, having regard to the transportation service rendered or to be rendered to Cincinnati shippers from Cincinnati to Chattanooga, 336 miles, over the C. N. O. & T. P. Ry. Co., a single trunk line without branches, the carrier performing it, taken by itself without having regard to distributing industries and population over 5,134.35 miles of main line and numerous unprofitable branch lines of the L. & N. R. R. and the N. C. & St. L. R. R. beyond the line from Cincinnati to Chattanooga. (See Exhibits B and X attached to main Brief.)

## (c)

**"70 cent schedule"**

Notwithstanding the fact that the Commission by unanimous vote unanimously condemned the "76 cent schedule" of rates as unjust and unreasonable, having regard to the service rendered by the carrier performing such service; and further notwithstanding the fact that the Commission by unanimous vote unanimously held that a "60 cent schedule" of rates was just and reasonable, having regard to the service rendered by the carrier performing it, taken by itself without having regard to distributing industries and population over 5,134.35 miles of main line and numerous unprofitable branch lines of the L. & N. R. R. and the N. C. & St. L. R. R. beyond the line from Cincinnati to Chattanooga, yet a majority of the Interstate Commerce Commission (Commissioners Clement and Lane dissenting) arbitrarily prescribed a "70 cent schedule" of rates as follows:

Classes	1	2	3	4	5	6
Cents per 100 pounds. . . . .	70	60	53	44	38	29

A majority of the Commission did not fix the "70 cent schedule" of rates as a schedule of just and reasonable rates having regard to the service performed by the carrier (the C. N. O. & T. P. Ry. Co.) that performed such service, but sought to ascertain a just and reasonable schedule of rates for services performed by the L. & N. Railroad and the N. C. & St. L. Railroad main line and numerous unprofitable branches 5,134.35 miles long beyond the line from Cincinnati to Chattanooga for services performed

**not** by the C. N. O. & T. P. Ry Co., but performed by the L. & N. Railroad and the N. C. & St. L. Railroad over their main lines and numerous unprofitable branches. Having ascertained such a schedule the Commission arbitrarily applied the same to Cincinnati shippers from Cincinnati to Chattanooga over the C. N. O. & T. P. Railway 336 miles, a single trunk line without branches, an amount held just and reasonable for the services performed by the L. & N. R. R. Co. and N. C. & St. L. Ry. Co. for the shippers over their main lines and numerous unprofitable branches and in direct violation of the mandate of the Act to Regulate Commerce and of the holding of the Supreme Court of the United States in the *Willamette Valley Case, supra*, that a schedule of rates must be just and reasonable, having regard to the service rendered by the carrier that is to perform it, i. e., in the case at bar a just and reasonable schedule of rates to the Cincinnati shipper of goods and merchandise from Cincinnati to Chattanooga over the C. N. O. & T. P. Ry., a single trunk line without branches 336 miles, the service for which is duly performed by the C. N. O. & T. P. Ry. Co. and not performed by any other carrier or railroad company, particularly not performed by the L. & N. R. R. Co. or the N. C. & St. L. R. R. Co.

The power in fact exercised by a majority of the Commission has been set out in the main brief (pp. 114-118), and this power in fact exercised by a majority of the Commission is emphasized by the opinion of the minority set forth in the main brief (pp. 118-130).

A majority of the Commission confounded the *factum probandum* with the *facta probans* (main brief, pp. 92-98) and ignored the unit of transportation service rendered (main brief, pp. 130-132) and turned competitive conditions into an instrumentality of a schedule of high rates and made the greater the wrong the lesser the right to redress and the greater the reason for a low and competitive schedule of rates the stronger the reason for refusing to fix such rates (219 U. S., 452), and turned the advantage of competing lines into a detriment and an argument for a higher schedule of rates (188 Fed. Rep., 255), and attempted to equalize fortunes, opportunities and abilities and take away the natural advantages of Cincinnati and confer them on 5,134.35 miles main line and numerous unprofitable branches of the L. & N. Railroad and N. C. & St. L. Railroad beyond the line from Cincinnati to Chattanooga. *Interstate Commerce Commission vs. Deffenbaugh* (November 13, 1911), 222 U. S., 42, at p. 46; *Ashland Fire Brick Co. vs. Southern Railway Company* (December 11, 1911), 22 I. C. C. R., 115, quoted in main brief (p. 169), which see.

#### (d)

#### Competition.

The matter of competitive conditions as bearing upon the arbitrary fixing of the "70-cent schedule" of rates will be discussed under the heading VI, Reply to Brief of Hon. Winfred T. Denison, Assistant Attorney-General" (this brief, p. 38).

## V.

**REPLY TO BRIEF OF HON. P. J. FARRELL, COUNSEL FOR THE INTERSTATE COMMERCE COMMISSION.**

We will briefly reply to the brief of Hon. P. J. Farrell, counsel for the Interstate Commerce Commission.

**(a)****Intervention.**

It is true as stated by Mr. Farrell (his brief, p. 4) that the L. & N. Railroad and the N. C. & St. L. Ry. intervened, but no relief was asked by them and no order was entered against them, the *factum probandum* in the case being whether the "76 cent schedule" of rates over the C. N. O. & T. P. Ry. Co., a single trunk line without branches from Cincinnati to Chattanooga, was just and reasonable. If the Commission did (as it in fact did) condemn the "76 cent schedule" of rates over the C. N. O. & T. P. Ry. Co., a single trunk line without branches from Cincinnati to Chattanooga as unjust and unreasonable, a new *factum probandum* arose, to-wit, the finding and substitution of a new just and reasonable schedule of rates over the C. N. O. & T. P. Ry. Co., a single trunk line without branches from Cincinnati to Chattanooga, having regard to the service rendered by the C. N. O. & T. P. Ry. Co., the carrier that was to perform it.

*Willamette Valley Case (Southern Pacific Company vs. Interstate Commerce Commission, 219 U.*

S., 433), *Mr. Chief Justice White*, p. 441, lines 17, 18 and 19 from the top; p. 442, lines 14 and 15 from the bottom; p. 451, lines 5 and 6 from bottom.

*Hooker vs. Interstate Commerce Commission*, 188 Fed. Rep., 242, dissenting opinion of *Judge Archbald*, concurred in by *Judge Mack*, at p. 255, lines 22, 23 and 24 from top.

(b)

**The Issue.**

The brief of Mr. Farrell presents a strange contradiction as to the issues involved. To read his brief at page 7, one would be led to believe that a constitutional question alone was presented, while page 15 of the brief clearly shows that the order of the Commission was assailed upon many grounds, including the following, in addition to the constitutional one, to wit: that the Commission (1) acted beyond its power; (2) applied erroneous rules of law; (3) failed to apply sound rules of law; (4) acted arbitrarily, etc. We had occasion to call attention in our main brief to a similar misapprehension by a majority of the Commerce Court (main brief, pp. 192-193).

(c)

**Cost of Transportation.**

To read the brief of Mr. Farrell (at page 19) one would suppose that we asked the Commission, the Commerce Court and this Court to fix a rate based on cost of transportation. A careful search of the rec-

ord and our briefs show the absurdity of this statement.

We did not ask the Commerce Court nor are we asking this Court to fix a schedule of rates. The Interstate Commerce Commission by unanimous vote condemned the "76 cent schedule" of rates as unjust and unreasonable. The question before the Commerce Court then was whether the Commission applied correct rules of law and delegated powers in fixing a new schedule of rates. Our contention has been and is now that a majority of the Interstate Commerce Commission applied erroneous rules of law, exercised powers not conferred upon the Commission, that the ruling of the Commission was not within the scope of delegated powers under which it purports to have been made, that ruling in form within delegated powers but authority in fact exercised on assumption of powers not delegated to Commission, that Commission purported to act for laudable and equitable purposes within the form of power but beyond its power, that power exercised and manifested in such an unreasonable manner that ruling was in the shadow and not within the substance of the authority given misconception and misapplication of the law to conceded and undisputed facts, in fixing the "70-cent" schedule of rates. We have simply asked this Court to nullify the **order** because the **order** made was thus reached. This is clearly set forth in our brief under the title of "Remedy" (pp. 190-192), and in the dissenting opinion of *Judge Archbald* concurred in by *Judge Mack* as set forth in our main brief (p. 194).

## (d)

**Remedy.**

Mr. Farrell's brief (pp. 20-25) is an entire misconception of the remedy asked, and his misapprehension is indicated above (c).

## (e)

**Mr. Farrell's Conclusions.**

Mr. Farrell's conclusions are set forth in his brief (pp. 26-30), in which he states that the profits of the C. N. O. & T. P. Ry. Co. are 8 per cent and not 44.18 per cent. So far as this part of the argument of Mr. Farrell in the case at bar is concerned it is immaterial whether the profits are 8 per cent or whether they are 44.18 per cent, because this is not an action to enjoin a rate, but an action to set aside and enjoin an **order** of the Commission, wherein a majority of the Commission made an order based on erroneous rules of law and in the exercise of powers not possessed by the Commission, etc. In view of the fact we have always conceded and still concede that both carrier and shipper are bound by the conclusions of the Commission, it is rather strange to find Mr. Farrell, as attorney for the Commission, seeking to make a deduction based upon a premise, which premise is ascertained by disputing the conclusions of the Commission. The "76 cent" schedule of rates has been under constant attack since November 24, 1894, and paragraphs 5 to 27 of the bill of complaint (record case



774, pp. 2-11) stated the case before the Commission. So far as the case involved an attack on the "76 cent schedule" of rates the Commission held unanimously that the complainants had made out their case and unanimously condemned the "76 cent schedule" of rates **and unanimously condemned the system of accounting urged by the counsel for the C. N. O. & T. P. Ry. Co. and now urged by Mr. Farrell as counsel for the Interstate Commerce Commission**, as follows (18 I. C. C., 462; record case 773, Exhibit A, at p. 78), to wit:

"The testimony shows that in order to handle the business offering it has been necessary already to expend large sums in the improvement of the roadway and structure, and that further large sums must be expended in the future. **This money, say the defendants, can only be obtained from income from operation, hence a sufficient rate should be allowed to permit the making of these necessary additions.**

**"This position is not well taken.** A railroad is entitled to a fair return upon the value of the property devoted by it to the public use, **but it is not entitled to have that property paid for by the public.** This Commission has so decided in *Central Yellow Pine Association vs. I. C. R. R. Co.*, 10 I. C. C. Rep., 505, and the Supreme Court has affirmed the correctness of that holding. *Illinois Central R. R. Co. vs. Interstate Commerce Commission*, 206 U. S., 441. **If these stockholders have entered upon this enterprise**

**without the means to provide necessary funds with which to carry it on, that can be no reason for the imposition of rates otherwise unreasonable."**

It may not be amiss in this connection to see exactly what the Supreme Court of the United States laid down in the *Illinois Central Railroad vs. The Interstate Commerce Commission* (1907), 206 U. S., 441, thus cited and approved by the Commission in the case at bar, wherein Mr. Justice McKenna gave expression to the following (at pp. 461-462):

"The Commission finds that the net and gross earnings of the appellant have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included 'expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements and also for equipment, such as locomotives and cars.' The Commission expressed the opinion that such expenditures should not be charged to a single year, but 'should be, so far as practicable, and so far as rates exacted from the public are concerned, "projected proportionately over the future."' And it was said: 'If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some extent diminished and in others increased to no material extent.' The exact effect of the difference of view between appellants and the Commission as to operating expenses

there is no test, but it cannot be said, even if the Commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. **The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise.** It would seem as if expenditures for addition to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. **But it is insisted that Union Pacific Railway Co. vs. United States, 99 U. S., 402, establishes the contrary. That case was not concerned with rates of transportation or the rule which should determine them against shippers."**

(f)

**Reasoning.**

Mr. Farrell contends (his brief, p. 13) that if the conclusions are right and the reasoning is wrong that a Court should not upset an order of the Commission. We agree absolutely, heartily and thoroughly with Mr. Farrell's contention. We do not want to be regarded as being so foolish as to contend to the contrary. But we do, however, contend most earnestly that if the reasoning used by the Commission (in the case at bar a majority of the Commission) shows that in fixing a schedule of rates the Commission (in the case at bar a majority of the Commission) misconceived the law, applied erroneous rules of law, and exercised powers not conferred upon the Commission, etc. (in the case at bar a majority of the Commission), the reasoning used by the Commission (in the case at bar by a majority of the Commission) is most pregnant in pointing out, showing and determining that the Commission (in the case at bar a majority of the Commission) did misconceive the law, did apply erroneous rules of law and did exercise powers not conferred upon the Commission, etc. (in the case at bar a majority of the Commission). This was pointed out with great force in the *Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S., 433), wherein *Mr. Chief Justice White* said (at p. 451):

“But upon the theory that the order was made merely as the result of the exercise of the statutory power to prevent the charging of an unrea-

sonable and unjust rate, having regard to the service rendered, **the inconsequence of the REASONING stated becomes at once patent.**"

## VI.

### REPLY TO BRIEF OF HON. WINFRED T. DENISON, ASSISTANT ATTORNEY-GENERAL.

We will briefly reply to the brief of Hon. Winfred T. Denison, assistant attorney-general.

#### (a)

#### Cost of Transportation.

Mr. Denison in his brief states (at p.     ) that:

"the theory of the petitioners appears to be that the Commission erred as a matter of law in not treating one sole fact as absolutely decisive (regardless of all other facts) on the question of the reasonableness of the rate, the **alleged** exclusive and controlling fact being the cost of service, via the shorter route."

We have never advanced any such theory nor have we made any such **allegation** and we **never** have set forth any such **alleged** "exclusive and controlling fact."

Mr. Denison has failed to perceive that the first question before the Interstate Commerce Commission was whether the "76 cent schedule" of rates should be condemned as unjust and unreasonable. **Mr. Denison also forgets that the Com-**

mission was unanimous in condemning the "76 cent schedule" of rates as unjust and unreasonable and it was in this connection that a majority of the Commission made reference to cost of operation as follows (18 I. C. C. R., 461; Record Case 773, Exhibit A, p. 77):

"The grades of this railroad (C. N. O. & T. P. Ry. Co.) are heavy, exceeding for 38 per cent of its distance a one per cent grade, and **the cost of operation and maintenance is high but nevertheless its net earnings**, computed upon the basis prescribed by the Interstate Commerce Commission, have for several years last past reached \$7,000 per annum."

Our objection, constantly urged, was that the action of a majority of the Commission (against which *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane* vigorously protested in a dissenting opinion) misconceived the law and applied erroneous rules of law and exercised powers not possessed by the Commission, etc., and confounded the *factum probandum* with the *facta probans* (evidentiary facts).

In fixing a schedule of rates we contended and conceded, as laid down in *Texas & Pacific Railway Co. vs. Interstate Commerce Commission* (96), 162 U. S., 197, at p. 234, that the Commission should not only consider the welfare of the carriers, but also traders and consumers of the country; and as laid

down in *Interstate Commerce Commission vs. C. R. I. & P. Ry.* (1910), 218 U. S., 88, at p. 234, that the outlook of the Commission and its powers must be greater than the interests of the railroad and shippers and be as comprehensive as the interests of the whole country. It is to beg the question and a *non sequitur* to say that therefore the order of the Commission is valid. The Commission having unanimously condemned the "76 cent schedule" as unjust and unreasonable, the question presented is whether in fixing a new schedule of rates the Commission followed the mandate of the statute as interpreted, construed and applied by the Supreme Court of the United States in the *Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S., 432, at pp. 441, 442 and 451) of fixing a schedule of rates as just and reasonable, having regard to the service rendered by the carrier that is to perform it. All the matters referred to are *facta probans* (evidentiary facts).

(b)

**Competition.**

While it is true that the Commission as laid down in *Texas and Pacific R. R. Co. vs. Interstate Commerce Commission*, *supra*, and *Interstate Commerce Commission vs. C. R. I. & P. Ry. Co.*, *supra*, should have a view as comprehensive as the whole country for the promotion of commerce, the welfare of carriers, shippers, traders and consumers of the coun-

try, yet there is nothing in these decisions, in the Act to Regulate Commerce and the Acts amendatory thereof and supplementary thereto, authorizing the Commission to aggregate and combine all the railroads of the country and fix a common rate for them or aggregate and combine the C. N. O. & T. P. Railroad Co., with 336 miles of main line, having no branches, and the L. & N. Railroad 4365, main line and numerous unprofitable branches and the N. C. & St. L. 1,230.05 miles main line and numerous unprofitable branches, and fix a common rate for all the mileage of said three main lines and branches.

*Interstate Commerce Commission Diffenbaugh* (November 13, 1911), 222 U. S., 42 (popularly known as the *Peavey Elevation Cases*), at p. 46, quoted in our main brief (pp. 167-169).

*Ashland Fire Brick Co. vs. Southern Railway Co.* (December 11, 1911), 22 I. C. C. R., 115, quoted in our main brief (p. 169).

The spirit of the Act to Regulate Commerce and Acts amendatory thereof and supplementary thereto is evinced by Section 5 of the Act to Regulate Commerce (Anderson's Index Digest of Interstate Commerce Laws, p. 12), against pooling, which section evinces a congressional policy of segregation and competition as against the policy of aggregation and combination. (Main Brief, pp. 147-152). This was well pointed out by Mr. Chief Justice White in the *Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S., 433), where he said (at p. 452):



"That the greater the wrong the lesser the right to redress and the greater the reason for the low and **competitive rate** the stronger the reason for refusing to fix such a rate."

The same thought is well expressed by *Judge Archbald*, concurred in by *Judge Mack*, in the dissenting opinion in the case at bar (188 Fed. Rep., 255):

"The supposed **advantage in competing lines** between the same points becomes a detriment if rates are to be kept up to help up the weakest road."

In his classic entitled "Railway Rate Theories of the Interstate Commerce Commission" (1911), M. B. Hammond says (pp. 108-109):

"The Act to Regulate Commerce was passed by a Congress which was strongly of the belief that competition between railroads was salutary in its workings and was to be fostered. The purpose of the regulation was not to thwart competition but to check monopoly. The framers of the act and those who voted for it may not have rightly understood the nature of railway competition and its effect in producing discriminations, but there can be no doubt that **they intended that the act should promote competition between carriers and between places, and that they placed reliance on competition as a rate making force beneficent in its results.**"

It is one proposition to have a view as comprehensive as the whole country and to consider commerce

and the interest of the carrier, shipper, trader and consumer of the whole country as evidentiary facts, and quite another proposition to violate the mandate of the Act to Regulate Commerce as interpreted, construed and applied by the Supreme Court of the United States, **that a schedule of rates must be just and reasonable, having regard to the service rendered by the carrier that is to perform it.** This is the policy declared by Congress, and it is through this policy and the powers conferred to enforce this policy that these matters as *facta probans* (evidentiary facts) are to be given consideration.

(c)

### **Transportation and Traffic Competitive Conditions.**

Mr. Denison in his brief (p. 4) has alluded to the transportation or traffic competitive conditions between Cincinnati and Chattanooga. We have fully discussed this in our main brief, both in the statement of the case (main brief, pp. 12-37), and in the argument (main brief, pp. 98-110), and we have further shown in the statement of the case (main brief, pp. 37-42), and in the argument (main brief, pp. 110-149), that more than a just and reasonable rate was imposed, not by reason of any mere alleged competitive weak road argument. This was clearly emphasized by *Judge Archbald*, concurred in by *Judge Mack*, in the dissenting opinion in the case at bar (188 Fed. Rep., 253-255).

The transportation or traffic competitive conditions between Cincinnati and Chattanooga are shown by the diagram in the bill of complaint (Record Case No. 773, p. 26; Record Case No. 774, p. 26, and Exhibit X of this brief). Mr. Denison's argument also loses sight of the fact that the Commission unanimously condemned the "76 cent schedule" from Cincinnati to Chattanooga. A majority of the Commission, after finding that the average gross earnings per mile were practically the same over each of the competitive routes from Cincinnati to Chattanooga **failed**, as pointed out by the minority of the Commission, to show that the L. & N. Railroad and N. C. & St. L. Railroad did not require equal remedial action (Record Case 773, Exhibit A, p. 91; main brief pp. 141-142). The Commission did not even confine itself within the rule announced *In the Matter of Proposed Advance in Freight Rates*, 9 I. C. C. R., 382; *Spokane Case*, 15 I. C. C. R., 376, and *Kindel vs. N. Y. N. H. & H. R. R. Co.*, 15 I. C. C. R., 555, as to rates between two points served by two or more carriers, but ascertained a common rate for 5,134.35 miles, main line and numerous unprofitable branches of the L. & N. R. R., and the N. C. & St. L. Railway beyond the competitive points, whose earnings were dragged down from \$25,593.40 per mile to \$11,207.67 per mile. They did not consider these merely as evidentiary facts in determining what would be a just and reasonable schedule of rates for the service rendered or to be rendered from Cincinnati to Chattanooga, but for the purpose and in the exercise of a power of distributing industries and population

in a territory beyond the section of transportation and traffic competitive conditions.

To sustain this extraordinary exercise of power Mr. Denison flies in the very teeth of the decision of the Supreme Court of the United States in the *Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S., 433) by asserting (his brief, p. 5) that this may be done **because** of "the **property invested in it** [L. & N. Railroad and N. C. & St. L. Railroad] **and on the FAITH of it.**" This is just what the Commission did in the *Willamette Valley Case* and this is just the reason on which the Supreme Court of the United States upset the order. The position of Mr. Denison is that the L. & N. Railroad and N. C. & St. L. R. R. has vested rights because it invested property on the faith of a certain schedule of rates and that it would be inequitable to change such schedule of rates. This line of argument was condemned by the Supreme Court of the United States in the *Willamette Valley Case*, *supra*, wherein Mr. Chief Justice White said (pp. 443-444), as follows:

"Applying these propositions, the insistence is that both in form and in substance the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad **when-**

ever the Commission deemed that it would be **EQUITABLE** to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a **WISE POLICY** to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission in the argument at bar does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of, a power which if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate pre-

vailing in the Willamette Valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things it is insisted were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one."

That there are no vested rights in a schedule of rates has been discussed in our main brief (main brief, pp. 152-157).

(d)

**Old Trade Route.**

Mr. Denison's contention (his brief, p. 5) amounts to the assertion that **"an old Trade Route"** or **"an old established trade route"** has a vested right in a schedule of rates and a vested right to fixed earnings. This idea of being tied down to an unprogressive and outdistanced past was exploded by the Supreme Court of the United States as early as 1896 in *Covington and Lexington Turn-Pike Company vs. Sanford*, 164 U. S., 578, wherein *Mr. Justice Harlan* (at pp. 596-597) said:

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public.

If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. **If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them** which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

The same thought was well expressed by *Judge Archbald*, concurred in by *Judge Mack*, in the dissenting opinion in the case at bar (188 Fed. Rep., 255), as follows:

**"The shipper is entitled to the benefit of any advance in transportation facilities that may be made, and is not to be tied down to the unprogressive and outdistanced past."**

(e)

**Note of Alarm.**

The cry of "wolf" and the "note of alarm" come with poor grace in view of the financial statements contained in the record of this case, as found even by a majority of the Commission. Although the fragment of the L. & N. Railroad from Cincinnati to Louisville, 114 miles, earned \$25,000 per mile (Record Case No. 773, Exhibit A, p. 81), and the fragment of the L. & N. Railroad from Louisville to Nashville, 185.9 miles, earned \$30,000 per mile (Record Case No. 773, Exhibit A, p. 81) (said two fragments together, with a 151 mile fragment of the N. C. & St. L. Ry. made a line from Cincinnati to Chattanooga) and although 4,365.20 miles of main line and numerous unprofitable branches dragged down the earnings of the L. & N. to \$11,207.67 per mile, yet the annual net earnings on the \$60,000,000 capital of the L. & N. Railroad Co. were as follows (also set forth in Exhibit X to Main Brief), to wit:

<i>Year</i>	<i>Per Cent.</i>
1881 <b>Stock Dividend</b> .....	100.00
1903.....	10.35
1904.....	11.11
1905.....	11.38
1906.....	10.58
1907.....	10.75
1908 (Panic Year).....	8.25
1909.....	14.31
1910.....	17.35



## VII.

**REPLY TO BRIEF OF MR. R. WALTON  
MOORE, COUNSEL FOR THE C. N. O.  
& T. P. RY. CO.**

We have already made reply to the brief of Mr. R. Walton Moore, counsel for the C. N. O. & T. P. Ry. Co. on the subject that "a shipper has equal rights with a railroad corporation to bring a bill in equity to annul an order of the Interstate Commerce Commission" (this brief, p. 1); that an "application for rehearing not sole or adequate remedy" (this brief, p. 16); as to "time of bringing suit" (this brief, p. 19); and that "a schedule of rates must be just and reasonable, having regard to the service rendered by the carrier that is to perform it" (this brief, p. 21). We will now reply to the other points in Mr. Moore's brief.

## (a)

**Genesis of Just and Reasonable Rates.**

The maxim of "fair return" is restrictive not only as to carrier's rights and wrongs, but also as to shippers' rights and wrongs. A schedule of rates that does not yield a fair return to a carrier is unjust and unreasonable to the carrier, and a schedule of rates which yields more than a fair return to the carrier is unjust and unreasonable to the shipper. The agitation which led up to an adequate remedy on the part of shippers was not the result of legislation sought by the carriers, but procured at the in-

stance and demand of shippers. This agitation (so far as Interstate Commerce was concerned) was embodied in the Cullom Report, which has been summarized in McPherson on "Railroad Freight Rates" (pp. 399-400), as follows:

"1. That local rates are *unreasonably high*, compared with through rates.

"2. That both local and through rates are *unreasonably high* at non-competing points, *either from the absence of competition or in consequence of pooling agreements* that restrict its operation.

"3. That rates are established without apparent regard to the actual cost of the service performed, and are based largely on 'What the traffic will bear.'

"13. That the common law fails to afford a remedy for such grievances, and that in cases of dispute the shipper is compelled to submit to the decision of the railroad manager or pool commissioner, or run the risk of incurring further losses by greater discriminations."

Section 1 of the Act to Regulate Commerce of February 4, 1887, that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof are declared to be unlawful," was not inserted to protect the carriers against confiscation, but to protect the shipper against unjust and unreasonable exactions.

One would suppose from a reading of Mr. Moore's brief that the Interstate Commerce Commission had followed a consistent theory, but this idea is dispelled by an examination of the decisions of the Commission as well summed up by M. B. Hammond in "Railway Rate Theories of the Interstate Commerce Commission" (pages 171 to 195), and what was said by the Commission itself, December 24, 1908 (pages 83 and 84), 22nd Annual Report, quoted in our main brief (p. 65) and what was said by *Mr. Commissioner Prouty*, February 22, 1911, *In re Investigation of Advances in Rates by Carriers in Official Classification Territory*, 20 I. C. C. R., 243, at p. 249, lines 1 and 2 and lines 8-12; p. 256, lines 10 and 11 and lines 16-18, and lines 19-22, and lines 25-27 from top; p. 261, lines 1 to 5 from top; p. 263, lines 15 to 23 from top; p. 266, lines 28-40 from top; p. 275, lines 1 to 8 from top. The analogy of this great case to the case at bar arises from the fact that that case involved a schedule of class rates and a comparatively few commodity rates and the case at bar involves a whole schedule of class rates. It hardly lies in the mouth of Mr. Moore (his brief, p. 31) to confine the Act to Regulate Commerce to discrimination when we consider the agitation leading up to the Cullom Report, the Cullom Report, Section 1, of the Act, and the numerous cases brought before the Commission, attacking rates on the ground that they were unjust and unreasonable, particularly since 1906, when the Commission was given power to prescribe just and reasonable rates for those condemned by it as unjust and unreasonable—a power

not possessed by the Commission prior to the passage of the Hepburn Act, June 29, 1906, extended to August 29, 1906 (Hines on Problems in Rate Making, p. 425, lines 12 to 15, from top of page).

Mr. Moore, in his readings (his brief, p. 24) has undoubtedly overlooked the foregoing history and conditions of the times, the agitation by the shippers, the Report of the Cullom committee and the decisions of the Interstate Commerce Commission, particularly its latest utterances.

(b)

**The term just and reasonable found in the statute is to be given its legal meaning and not its popular meaning.**

In the *Willamette Valley Case* (*Southern Pacific Co. vs. The Interstate Commerce Commission*, 219 U. S., 433), it was contended by the shippers that the term "just and reasonable" was to be given a popular meaning as meaning a wise policy and as meaning equitable. The carriers contended that the terms "just and reasonable" had a legal meaning, and their contention was sustained by the Supreme Court of the United States, wherein *Mr. Chief Justice White* set forth the contention and denial thereof "that there was authority to substitute for a just and reasonable rate **one which in and of itself in a legal sense** might be unjust and unreasonable."

## (c)

**Revenue.**

There seems to be a lack of harmony on the part of counsel for the other side in interpreting the theory of the shippers in the case at bar, Mr. Farrell (his brief p. 19) and Mr. Denison (his brief p. 2) insisting that the shipper's theory in the case at bar rests "*exclusively* on the cost of transportation," and Mr. Moore insisting that the shipper's theory in the case at bar rests "exclusively on revenue" (his brief, pp. 11, 19, 23, 26, 30).

When a schedule of rates is attacked as unjust and unreasonable, one of the important considerations is the amount of profit secured to the investor, and it is a sound proposition that the actual investment in an enterprise needed for giving the public adequate transportation facilities is entitled to and should have a reasonable return and no more than a reasonable return in the form of a constant profit; and a reasonable schedule of rates is one that will produce such a result. This is no theory of ours, but is the language of the Interstate Commerce Commission itself (see our main brief, p. 65). In the case at bar the shippers filed a complaint with the Commission, which, with the findings of the Commission thereon unanimously condemning the "76 cent schedule" of rates, is set forth in the record (Bill of Complaint, paragraphs 7 to 31, record case No. 774, pages 3 to 16). All revenue factors were set forth in the bill of complaint, and the entire Interstate Commerce Commission unanimously agreed with the

position of the shippers that on the showing made the "76 cent schedule" of rates was unjust and unreasonable and unanimously condemned the same.

The complaint of the shippers lies exclusively in the method pursued by a majority of the Commission in reach the "70 cent schedule" of rates, and the shippers complain that in so doing a majority of the Commission:

- (1) Acted arbitrarily;
- (2) That its ruling was not within the scope of the delegated power under which it purported to act;
- (3) That while its ruling was in form within its delegated powers the authority in fact exercised was on the assumption of powers not delegated to the Commission;
- (4) That the Commission purported to act for laudable and equitable purposes within formal power, but in fact beyond its powers and for what the Commission thought was a wise public policy in fixing what it thought was a just and reasonable rate in a popular sense, but which in and of itself in a legal sense was an unjust and unreasonable schedule of rates;
- (5) That its order was the result of power exercised and manifested in such an unreasonable manner that ruling was within the shadow and not within the substance of the authority given;
- (6) Misconception and misapplication of law by the Commission to conceded and undisputed facts;
- (7) Ruling for convenience of Commission as to avoid investigation and conclusion as to important factors; and

(8) Ruling mere fiat and arbitrary to the extent of violating due process of law.

We have never said (although we may believe) that the "60 cent schedule" of rates was just and reasonable, but a majority of the Commission has said so under enumerated factors. We did not ask the Commerce Court and we are not asking this Court to fix a "60 cent schedule" or any other schedule, but are asking this Court to declare void the order fixing the "70 cent schedule" as clearly pointed out in the prayer (main brief, pp. 190-192), and as also clearly pointed out by *Judge Archbald* concurred in by *Judge Mack* in the dissenting opinion in the case at bar (188 Fed. Rep., 255).

(d)

**Weak Roads Argument.**

**After all that has been said the final proposition as contended for by the other side boils itself down to a consideration of the so-called "weak roads argument."**

Mr. Moore, in his brief, seeks to state the genesis of this rule of so-called "weak roads argument," but omits all reference to the limitation stated within the rule itself, and fails to point out that the case at bar falls entirely outside its limitations.

*First Annual Report.* Mr. Moore refers in his brief (p. 34) to the First Annual Report of the Commission (p. 34). *Judge Cooley* there states that in adjusting a case of alleged excessive rates that you

can consider rates on other lines and at other points. We have always asserted the same proposition (bill of complaint, paragraph 52, sub-paragraph *d*, Record case No. 774, p. 35), and there is no doubt but what *Judge Cooley* had in view was that these matters were to be considered as *facta probans* (evidentiary facts) and not the *factum probandum*. In other words, if the duty devolved on the Commission to fix a schedule of just and reasonable rates from A to B (*factum probandum*), the Commission could consider a schedule of rates from X to Y as *facta probans* (evidentiary facts), tending to establish or test what would be a just and reasonable schedule of rates from A to B. *Judge Cooley* did not say that when the duty devolved on the Commission to fix a just and reasonable schedule of rates from A to B that the Commission should ascertain the schedule of rates from X to Y; from M to N; and from K to L, and then make a common rate from X to Y; M to N; and K to L, and apply this common rate from A to B, **particularly without ascertaining whether the conditions were substantially similar.**

*Rice, Robinson and Witherop vs. Western N. Y. & P. A. R. R. Co.* (December 2, 1888), 2 I. C. R., 298. Mr. Moore cites this case in his brief (pp. 34-35), and it is a direct repudiation of the doctrine for which it is cited. In the case cited propositions 1 and 2 of the syllabus are as follows:

“1. Where unreasonableness of freight rates on oil in car load lots is charged on short local hauls, for example, from Titusville, Pa., to Buf-



falo, N. Y., and the charge is attempted to be sustained on a comparison of these rates with rates on what is usually an inferior grade of oil transported from Titusville through Buffalo to Perth Amboy, N. J., for export, chiefly in the cars of another company, and it appears that upon such shipments destined to Buffalo there are expensive terminal charges, while upon such shipments to Perth Amboy these terminal charges are far less considerable, **the circumstances and conditions which control the making of the rates in each instance are substantially dissimilar.**

“(2) In arriving at what is a just and reasonable rate on freight transported by a carrier on a short local line having but a small volume of business, **where the cost of transportation is exceptionally great, arising from steep grades, sparse population, and light traffic, these are circumstances and conditions of controlling weight** in the making of the rates, and can not be overlooked when a question of their reasonableness is involved; and under such circumstances the fact that an independent **pipe line** from Titusville to Buffalo **transports oil between these points at lower rates than the railroad company, constitutes no just reason why the railroad company should be required to reduce its rates to those of the pipe line.**”

The first proposition of the syllabus in the case cited therefore sustains our position that a common rate is only to be made where the conditions are sub-

stantially similar, but not where they are substantially dissimilar.

Proposition 2 of the syllabus also sustains our position because of the substantial dissimilarity between transporting oil by railroad from transporting oil by pipe line and because of the substantial dissimilarity of circumstances, a common rate could not be made for both the railroad and the pipe line.

These two propositions were ample to dispose of the case, and what was further said in the case was pure dictum and has been fully answered by the Courts in the cases cited in our main brief (main brief, pp. 154-155).

*Rend vs. Chicago and Northwestern R. R. Co.* (January 26, 1889), 2 I. C. R., 313. Mr. Moore cites this case in his brief (pp. 35-36). It sustains our contention that a common rate is to be made only under substantially similar conditions. The first proposition of the syllabus is as follows, to wit:

“1. Group rates may be properly made from a large number of mines practically composing a coal mining district extending across the State of Illinois to points in Western Wisconsin, Minnesota and Dakota, *the distance from each part of the group by some route being substantially a fair equivalent of the distance from other points, and the commercial necessities being substantially the same for all.*”

It appears from the report of this case (p. 314, second column, lines 9 and 10 from the bottom) that the complaint was as to discrimination and not as to an unjust or unreasonable schedule of rates.

This one proposition above quoted was ample to dispose of the case and what was further said in the case was pure dictum and has been fully answered by the Court in the cases cited in our main brief (main brief, pp. 154-155).

This case therefore fully sustains our proposition that a common rate is only to be made for two lines when the two lines operate under substantially similar conditions.

*Shippers Union of Phoenix vs. A. T. & S. F. Ry. Co.* (June 4, 1902), 9 I. C. R., 25. Mr. Moore cites this case in his brief (p. 36). The syllabus of this case is as follows, to-wit:

“The Santa Fe and Southern Pacific systems reach Los Angeles, Cal., a point to which rates from the east are affected by water competition. Phoenix, Ariz., is not upon either of these through lines, but is connected therewith by two lateral lines, one on the north connecting with the Santa Fe at Ash Fork, and one on the south connecting with the Southern Pacific at Maricopa. On complaint that freight rates between New York, Chicago, St. Louis and other eastern points and Phoenix are unjust and unreasonable in themselves and relatively as compared with rates on like traffic between New York and such other eastern points and Los Angeles, Held:

“(1) That when water competition permits the establishment of classifications and rates below the rates to non-competitive points, such lower rates while possessing value as standards of comparison, are not always conclusive in fixing rates to shorter distance points not affected

by such competition, *and there is no evidence in this case upon the reasonableness of the rates to and from Phoenix except comparison with Pacific Coast Rates.*

“(2) That the evidence in this case is insufficient to constitute the basis of a decision requiring defendant carriers to modify their long standing system of rate making, which also applies over other transcontinental lines throughout a great belt of territory and affects numerous localities and interests which have not been heard in this proceeding, and this being so the relief sought by the complainant is for the present denied, *but the case is retained for further consideration pending the investigation and disposition of other cases involving the same general question.*”

The first proposition of the syllabus again sustains our claim that a common rate is only to be prescribed under substantially similar circumstances. In the case just cited there were substantially dissimilar circumstances, in the case of one railroad, water competition and in the case of the other railroad no water competition. Presence of water competition in one case and the absence of water competition in the other case made the substantial dissimilarity of conditions, and therefore made the deduction sound that a common rate could not be prescribed for both.

In the case cited other carriers had no opportunity to present evidence as to whether their conditions were substantially similar or substantially dissimilar, and therefore the Commission refused to dismiss the

complaint of the Shippers Union of Phoenix, but retained the case for further consideration.

*In the Matter of Proposed Advances in Freight Rates* (April 1, 1903), 9 I. C. R., 382. Mr. Moore cites this case in his brief (pp. 36-37). The nature of this proceeding is thus stated by *Mr. Commissioner Prouty* (at p. 384):

“During the last of November, 1902, tariffs were filed with the Commission, giving notice of advances in rates of general application. About the same time, owing largely to published interviews of railway traffic officials, the impression grew up that other general advances were to be made. This was widely commented upon by the press, and was the subject of considerable informal complaint to us. Any general advance in transportation charges is a matter of great public concern, and it seemed especially appropriate that the Commission, in the discharge of its duty to keep informed touching the methods and practices of railway carriers subject to the Act to Regulate Commerce should ascertain the reason for these advances. An order was accordingly entered on December 1st, respecting rates upon grain and grain products, dressed meats and provisions from the Mississippi River to the Atlantic Seaboard, by which the leading lines of railway engaging in this traffic were required to appear at Washington on December 16th for the purpose of giving information touching the advances which had been made or were contemplated in these rates.”

It will also be noticed (pp. 383-384) that this was not an adversary proceeding and 33 persons, namely, railroad presidents, vice-presidents, traffic-managers, general managers, general freight agents, and railroad lawyers alone appeared as representing the carriers, and there were no appearances for the shippers.

No order was made, and at the conclusion of the report (p. 439) *Mr. Commissioner Prouty* said:

“This proceeding is in the form of a general investigation. Although the carriers were fully heard by their traffic representatives, and, in some instances, by their attorneys, the proceeding is in a manner *ex parte*. Many facts of great importance were not brought out in this inquiry, and a further development of those facts and a further discussion of the matters involved might lead to a different conclusion. No order can be made in this investigation, but unless on or before the 15th day of May, 1903, these rates are readjusted in accordance with the views here expressed, proceedings will be begun against the several lines which will put directly at issue the rates involved.”

In the course of his opinion, *Mr. Commissioner Prouty* said (at p. 401):

“Every such inquiry [as to a just and reasonable rate] involves the idea of some limit beyond which the capital invested in railways ought not to be allowed to tax other species of property.”

Mr. R. Walton Moore makes a quotation from a part of pages 425 and 426 without reference to the context preceding and following. **Mr. Commissioner Prouty went into an exhaustive consideration of the revenue factors of TWO trunk lines to the Seaboard before using the language quoted by Mr. Moore,** and this caused *Mr. Commissioner Prouty* to put the following query (at p. 425):

*"The question now presents itself, must we go further and examine the financial showing of the other lines in determining what rate shall be applied by these lines?"*

He then desisted from making an examination as to the financial showings of the other lines. In the case at bar both the majority of the Commission and the minority of the Commission after making an examination of the financial showing of the C. N. O. & T. P. Ry. Co., made an examination of the financial condition of the L. & N. Railroad and the N. C. & St. L. Railroad and found substantially similar conditions between Cincinnati and Chattanooga, and substantially dissimilar conditions beyond those points.

In the matter cited the Commission then picked out two strong lines between the east and the west (at p. 426), namely the Pennsylvania Railroad as one line and the Lake Shore plus the New York Central line as the other. *Mr. Commissioner Prouty* then said (at p. 426):

**“We are inclined to think in the present case the public is entitled to whatever is a reasonable rate by these two great railway systems between the east and the west.”**

It will therefore be noticed that the Commission did not prescribe a common rate for all the lines to the Seaboard, but having found that the two strong lines, Pennsylvania Railroad and the Lake Shore plus the New York Central, were operating under substantially similar circumstances and conditions indicated, that they would suggest a reasonable rate for these two strong lines and let the weak ones voluntarily adopt the same or a lower rate if they expected to get some of the tonnage.

This court's particular attention is called to the fact that the Commission clearly recognized what had been laid down by the Commission in the four instances cited in Mr. Moore's brief and analyzed in this brief, that a common rate is only to be prescribed for two or more competing lines under substantially similar circumstances and conditions, and Mr. Commissioner Prouty emphasized that fact in the above entitled matter by suggesting a common rate for the Pennsylvania and New York Central Lines, whose transportation and traffic circumstances and conditions were substantially similar.

It therefore follows that in all five cases cited in Mr. Moore's brief our position is fully maintained that a common rate is to be prescribed for two or more competing carriers only under substantially similar traffic and transportation circumstances and



conditions. We therefore heartily subscribe to the points actually and properly decided by these five cases, but not to their misinterpretation nor to excerpts therefrom separated from the context from which the excerpts were separated.

*Deductions sought to be drawn therefrom as to inaction of Congress are fallacious.* Mr. Moore in his brief seeks to draw therefrom the deduction that as these decisions were made prior to 1906 and were within the knowledge of Congress when the Hepburn Act of 1906 was passed that there was no intention to change them (his brief, pp. 37 and 39-40). When these cases are properly analyzed and the limitations are kept in mind as indicated in the cases themselves and the facts of the cases are not lost sight of the deduction is absurd. **There can be no criticism of a rule uniformly followed in these five cases that a common rate is to be prescribed for two or more competing lines under substantially similar circumstances and conditions.**

Mr. Moore failed to cite the case of *Evans vs. Union Pacific R. R. Co.* (February 8, 1896), 6 I. C. R., 520, wherein the second proposition of the syllabus is as follows:

“2. A showing of *substantial similarity* in transportation conditions is necessary to make the rates of carriers in sections of the country other than that served by the defendant road proper standards of comparison in a case of alleged unjust and unreasonable charges.”

Between 1906 and the next case cited by Mr. Moore he failed to cite three other cases.

In *Memphis Freight Bureau vs. Fort Smith & Western R. R. Co.* (December 9, 1907), 13 I. C. C. R., 1, Mr. Commissioner Clark said (at p. 5):

“Complainant further contends that the through rates on cotton seed from the points on the Fort Smith & Western Railroad should be no higher than the rates on cotton seed to Memphis from points on the Chicago, Rock Island & Pacific Railway, which are similarly distanced from Memphis. Nothing appears in the testimony to indicate that conditions are the same at the towns on the Rock Island as at the corresponding towns on the Fort Smith & Western. *There is much in the record to show that conditions are not at all similar, but differ widely as to the age and population of the towns, tonnage of the railroads, competitive conditions, development of the country, and conditions as to local markets.*”

In *Hydraulic Press Brick Co. vs. St. L. & S. F. R. R. Co.* (April 6, 1908), 13 I. C. C. R., 342, Mr. Commissioner Clements said (at pp. 347-348):

“The Illinois Central Railroad not being a party defendant in this case, the Commission can not prescribe the through rates via the route made up of that line and of the Morgan’s Louisiana & Texas Railroad & Steamship Company’s Line. Neither can it in dealing with the rate applied on the shipments in question prescribe a joint through rate via the route over which these shipments moved upon the basis of what might

be regarded as a reasonable rate via the shorter line. These shipments were carried a distance of 1,208 miles, and while it is probable that if the lines constituting the longer route are to continue to participate in the business between these points they must accept rates that are not higher than the rates which when applied via the shorter route are reasonable and just, we would not be justified in so ordering or in awarding reparation on past shipments upon that basis. A carrier may in its own interest, if it so desires, carry for a longer distance over its own line than would be necessary if carried between the same points over the line of its competitor, in order to obtain a portion of the competitive business upon terms that will afford some profit. It does not necessarily follow, however, that a carrier in competing for traffic in this way thereby subjects itself to an order compelling it to do so."

In *Rhineland Paper Co. vs. N. P. Ry. Co.* (June 8, 1908), 13 I. C. C. R., 633, Mr. Chairman Commissioner Knapp (at p. 635) said:

"The Commission has frequently pointed out that a comparison with rates in other and distant parts of the country, *where different physical, competitive, and traffic conditions exist*, is insufficient to establish the unreasonableness of the rates under examination."

*City of Spokane vs. N. P. Ry. Co.* (February 9, 1909), 15 I. C. C. R., 376. Mr. Moore cites this case in his brief (p. 38). The official syllabus of this case, paragraph 3, is as follows, to-wit:

**“In determining what are reasonable rates BETWEEN TWO POINTS** neither that railroad which can afford to handle traffic at the lowest rate nor that whose necessities might justify the highest rate should be exclusively considered. Rates must be established with reference to the whole situation.”

This case involved discrimination, undue preference, violation of the long and short haul provisions of Section 4 and whether the rates were unjust or unreasonable, water competition and the construction of transcontinental rates.

In this case just cited, *Mr. Commissioner Prouty* selected the Great Northern and the Northern Pacific; selected the rates from the two common termini, to-wit, St. Paul to Spokane, and made specific reference to the fact that these two lines *directly* handled the traffic (p. 394). In other words, he did precisely as he did in *Re Proposed Advance in Freight Rates*, 9 I. C. R., 382, selected the commodities and the west and the seaboard as the two termini and selected the two strong lines operating under substantially similar circumstances and conditions, to-wit, The Pennsylvania and the New York Central (at p. 394). *Mr. Commissioner Prouty* said as to surplus earnings (at p. 414):

**"If having imposed excessive tolls it still has in its possession the surplus over and above what would have resulted from a fair charge, that surplus belongs to the people and is held by the private corporation for the benefit of the people."**

This has peculiar application to the case at bar, wherein the C. N. O. & T. P. Ry. Co., under a "76-cent schedule" unanimously condemned by the Commission as unjust and unreasonable has earned over 44 per cent per annum on its capital and holds as a surplus on which it seeks to make further returns and not hold for the benefit of the people and accord them corresponding reduction of rates by reason of its increased earnings therefrom. **This is particularly true in view of the fact that the Cincinnati shippers have since 1894, a period of 18 years, made a persistent and consistent fight against the "76 cent schedule" of rates now twice unanimously condemned by the unanimous vote of the Commission as unjust and unreasonable and excessive.**

In all the factors in the Spokane Case on a schedule of rates between the two termini from St. Paul to Spokane the circumstances of transportation and traffic competition were substantially similar between said two lines selected by *Mr. Commissioner Prouty*. The third proposi-

tion of the syllabus therefore well expresses the point made by the Commission as applied to the substantially similar transportation and traffic circumstances and conditions. The commodities transported were the same, the termini were the same, to-wit, St. Paul to Spokane, the *factum probandum* was a just and reasonable schedule of rates from St. Paul to Spokane over two lines under substantially the same circumstances and conditions, and therefore the Commission might prescribe a common rate for the two lines, to-wit, the Great Northern and the Northern Pacific. It was for the good judgment and discretion of the other longer and weaker lines to prescribe similar or lower rates if they desired a share of the tonnage. This case therefore does not sustain the proposition for which it was cited by Mr. Moore, and contains the same limitation as contained in the other cases that you can prescribe a common rate for two lines between the same two termini under substantially similar circumstances and conditions. The decision in this case, however, was not accepted as a finality or one on which to base an amendment of the statute because it bobbed up again under the same number on the docket of the Commission, to wit, No. 879, reported in 16 I. C. C. R., 179, May 3, 1909, and again in 19 I. C. C. R., 162, June 7, 1910, and again in 21 I. C. C. R., 400, June 22, 1911, and is involved in *Commercial Club, Salt Lake City vs. A. T. & S. F. Ry. Co.* (June 7, 1910), 19 I. C. C. R., 218, and June 22, 1911, 21 I. C. C. R., 400; and *Railroad Commission of Nevada vs. R. R. Co.* (June 6, 1910), 19

I. C. C. R., 238, none of which cases have finally been disposed of and have been subject of litigation in the Commerce Court and are now on appeal in this Court. Considering the dates of these decisions no deductions can be drawn therefrom, as claimed in the brief of Mr. Moore (his brief, p. 39). If these decisions were wrong, to-wit, decisions of June 6th and 7th, 1910, and June 22, 1911, they could not have been corrected by the Act of June 18, 1910, amending the Act to Regulate Commerce, because the Spokane Case was not disposed of by the Commission until more than a year later.

*Kindel vs. N. Y. N. H. & H. R. R. Co.* (March 2, 1909), 15 I. C. C. R., 555. Mr. Moore cites this case in his brief (p. 39). In this case *Mr. Commissioner Clark* gives his interpretation of the *Spokane case*, *supra*, as follows (at p. 561):

“In the *Spokane Case*, 15 I. C. C. R., 376, we held that the **reasonableness of rate between two points served by two or more carriers** could not be determined by consideration alone of that line which is shortest and most favorably situated as to operations, earnings, etc., but that the entire situation must be considered.”

It will be noticed that he thus limits the rule, as had already been limited in all the other cases cited by Mr. Moore to a rate between the same two termini and then to the traffic, transportation and competitive conditions between two or more carriers between the same two termini. He lays down no rigid rule

that a common rate must then be applied, but that they shall be considered, i. e., the rate on each being a separate *factum probandum* and the rate on each as to the other a separate *factum probans*. It might well be in determining each *factum probandum* that there would be a coincidence of the same rate for each carrier for carrying the same commodity between the same two termini. Properly interpreted there was therefore nothing in this case calling specifically for an amendment of the Act to Regulate Commerce or an acquiescence in such misapplication of any doctrine to the facts as happened in the case at bar. In the Kindel Case there was no exacting of an excessive rate from the shipper of goods, wares and merchandise from A to B for the purpose of diffusing industry and population on thousands of miles of numerous unprofitable branch lines of other carriers far removed from the section between the two termini, A to B.

*Board of Trade of Winston-Salem vs. N. & W. Ry. Co.* (April 12, 1909), 16 I. C. C. R., 12. Mr. Moore (who was counsel in this case) cites this case in his brief (p. 39). The syllabus of this case is as follows, to-wit:

“Complainants allege that rates on bituminous coal in carloads from the Pocahontas (Va.) district to Winston-Salem and Durham, N. C., are unreasonable, and ask that defendant be required to establish the same rates to said points that are made by it to points east of Norfolk, Va., and Lynchburg, Va. Reparation is also asked: Held,  
(1) **That circumstances and condi-**



tions of transportation are different at **MAIN LINE** points from Lynchburg to Norfolk than at Winston-Salem and Durham **ON BRANCH** lines to the south from the main line, and defendant may make higher charges to the latter points. (2) That under the circumstances shown the rate charged Winston-Salem on soft coal in car loads is unreasonable to the extent that it exceeds \$2.10 per ton, and that the charge to Durham is unreasonable to the extent that it exceeds \$2.20 per ton. Reparation is denied."

This case absolutely sustains our position of dissimilar circumstance and conditions and further holds that a common rate on a branch line from Winston-Salem to Durham could not be prescribed in common for a main line from Lynchburg to Norfolk. It must also be noticed that *Mr. Chairman Commissioner Knapp* says (at p. 18):

"Complainants ask that the rates to Winston-Salem and Durham be made the same as to Roanoke and Lynchburg, \$1.50. This, in our opinion, ought not to be required. **Transportation conditions** on both the Winston-Salem and Durham lines are **materially different** from those prevailing between **main-line** points or **between points on the system where MAIN-LINE CONDITIONS control**. Rates were not made and have not been maintained to Winston-Salem and Durham under the conditions of competition that existed on the main line and on the line to Hagerstown. The **cost of service** on the lines in question is materially higher than on the main line between points of similar distance."

Although this case holds as in all the other cases that a common rate between the same two points can only be charged under substantially similar circumstances and conditions, yet Mr. Moore (his brief, p. 39) urges again his deduction that Congress acquiesced in the doctrine for which he is contending and that an appeal should have been made to Congress for legislation.

*Cases decided since April 12, 1909, omitted by Mr. Moore.* Attention is called to two cases decided since April 12, 1909, not cited by Mr. Moore. In *Chicago Lumber and Coal Co. vs. T. S. Ry. Co.* (May 4, 1909), 16 I. C. C. R., 323, the 8th proposition of the syllabus is as follows:

**"The law does not deal with carriers collectively as a single unit or system, but its commands are directed to each with respect to the service which it is required to perform."**

*Mr. Commissioner Clements* said (at p. 328) that:

**"Each case must be decided upon its own merits, and in arriving at a conclusion in respect to the rates here involved, the decision in another case against carriers operating in a different territory under essentially dissimilar circumstances and conditions affords no proper criterion therefor. The contention of complainants disregards the dissimilarity of transportation conditions in the two producing territories."**

In *Colorado Bedding Co. vs. C. B. & Q. R. R. Co.* (May 9, 1910), 18 I. C. C. R., 403, Mr. Commissioner Cockrell said (at p. 404) that:

**"We have uniformly held that the existence of a lower rate via a competing route does not of itself establish the unreasonableness of the rate actually charged."**

(e)

**Case at Bar Radical Departure From Limitations Imposed on Weak Roads Argument in All Previous Decisions of Interstate Commerce Commission.**

The decision of a majority of the Commission in the case at bar, *Receivers and Shippers Association vs. C. N. O. & T. P. Ry. Co.* (February 17, 1910), 18 I. C. C. R., 440 (in fact, decided May 24, 1910) (188 Fed. Rep., 244), was a misconception, misapprehension and misapplication of even the weak roads argument and an arbitrary and unlawful departure from limitations thereon, even as expressed by the Interstate Commerce Commission from 1887 down to May 9, 1910.

In the case at bar the L. & N. Railroad, with its 4,365 miles, and the N. C. & St. L., with its 1,230.05 miles, intervened, and the Commission had before it the following:

(a) From Cincinnati to Chattanooga, a substantial similarity of conditions over the C. N. O. & T. P. Ry. Co., 336 miles, and a fragment of the L. & N.

Railroad, 299.9 miles, and a fragment of the N. C. & St. L. Ry., 151 miles, a total of 450.9, all as set forth in Exhibit X.

(b) From Cincinnati to Chattanooga, over the C. N. O. & T. P. Ry. Co., 336 miles, main line and no branches, substantial dissimilarity of conditions from the L. & N. Railroad, with numerous unprofitable branches, 4,365.20 miles, and the N. C. & St. L. Railroad, with numerous unprofitable branches, 1,230.05 miles, a total of 5,585.25 miles, main line and unprofitable branches, with 5,134.35 miles, main line and numerous unprofitable branches, beyond the section from Cincinnati to Chattanooga.

We have the distinct findings by a majority of the Commission (Record Case No. 773, Exhibit A, p. 81, 18 I. C. C. R., 465), as follows:

“The Cincinnati & Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville and Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville and Nashville about \$11,000 per mile and of the Nashville, Chattanooga and St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nash-

ville, Chattanooga & St. Louis, between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile. **Now in adjusting the rates of the Louisville and Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?**

**"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch line business when it reaches the main line is surplus traffic from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rate upon the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it." [This in the face of the unanimous finding of Commission and admitted and conceded fact that it has no branches.]**

In addition the bill of complaint sets forth (bill of complaint, paragraph 64, Record Case No. 774, p. 47) that:

**"Your orators further show that the facts set forth below, in the concurring opinion of Commissioner Clements, in which Commissioner Lane joined, were undisputed and admitted facts in said case No. 1542, and that the rules of**

law laid down by said Commissioner Clements as set forth below in said concurring opinion were sound rules of law applicable to said case No. 1542, and that said Commission in its said report, which was made a part of the order in said case No. 1542 arbitrarily, oppressively, unlawfully, unjustly and unconstitutionally ignored said facts and laid down rules of law contrary thereto and thereby deprived the said parties aggrieved of their property and just rights and of the full and adequate relief and remedy to which complainants and the parties aggrieved were and are entitled.

“Your orators further show that they hereby adopt said concurring opinion of said Commissioner Clements as a part of this their bill of complaint as bearing on a just and reasonable schedule of rates and as showing to this Court the admitted facts and correct rules of law applicable thereto in this case, the same being as follows, to-wit:”

The demurrer to the Bill of Complaint admitted this to be true, together with the facts set forth in the dissenting opinion of *Mr. Commissioner Clements*, concurred in by *Mr. Commissioner Lane* and attached to the Bill of Complaint marked Exhibit A and made part of the Bill of Complaint. *Mr. Commissioner Clements* (Record Case No. 773, p. 83, 18 I. C. C. R., 467) said:

“While concurring in the order of the Commission, reducing the rates involved from Cincinnati to Chattanooga, because, although the reductions are slight, they afford some relief, I am convinced that the reductions made do not

meet the just demands of the complaint, in view of the facts shown. Nor do I agree to all the statements *or the reasonings* or conclusions of the foregoing report."

And again (Record Case No. 773, pp. 88 to 91, 18 I. C. C. R., 472 to 475) :

"I have suggested that complainants are entitled to greater relief than that proposed in the report. There is no doubt of the flourishing condition of the Cincinnati, New Orleans and Texas Pacific and in my mind none that it can operate with a reasonable profit under further reduced rates **or that by such rates a hardship will be worked upon the carriers in the other and longer route between Cincinnati and Chattanooga.** The Cincinnati, New Orleans and Texas Pacific is a leasing company, capitalized at \$5,500,000, consisting of \$2,500,000 preferred and \$3,000,000 common stock. The present rental of the Cincinnati Southern is slightly in excess of \$1,000,000 per annum. The history of this property is set out at some length in the report. Looking to a comparison of financial conditions it appears that for the years 1904, 1905, 1906 and 1907, gross earnings per mile from operations of the Cincinnati, New Orleans & Texas Pacific and Southern Railways and Groups 1, 2 and 3 of the Commission's system of grouping for statistical purposes, were as follows:

	1904.	1905.	1906.	1907.
Cincinnati, New Orleans and Texas Pacific .....	\$20,193	\$21,730	\$24,965	\$25,831
Southern .....	6,295	6,687	7,273	7,506
Group 1.....	13,994	14,511	15,528	16,314
Group 2.....	20,187	20,752	22,517	24,538
Group 3.....	11,863	12,483	13,789	14,922

"Groups 1, 2 and 3 include all of New England, New York, Pennsylvania, New Jersey, Delaware, Maryland and a portion of West Virginia, also Ohio, Indiana and the southern peninsula of Michigan, and are by far the greatest revenue producers. As to the other seven groups, the Cincinnati, New Orleans and Texas Pacific produces in every case gross revenues per mile three to four times greater. It will be observed that the Southern Railway produces not one-third the gross revenue per mile of the Cincinnati Southern. The average gross earnings per mile of the railroads of the whole United States for the year 1906 was \$10,460. The density of traffic of the Cincinnati, New Orleans & Texas Pacific has gradually increased from two in 1894 to nearly three times in 1906 the average density of all the roads in the United States, and from 1904, when the density per mile of line about equaled the average in Group 2, which includes Delaware, New Jersey, Maryland, the greater part of Pennsylvania and New York, and a small portion of West Virginia, the increase on the Cincinnati, New Orleans and Texas Pacific has been gradual until in 1906 this road's density was materially greater than that of Group 2. During these years this line has con-



sistently enjoyed about five times the density per mile of the Southern Railway, by which it is controlled. The increase in density of traffic on the Cincinnati Southern was 169 per cent greater in 1906 than in 1904, as compared with 115 per cent average increase of all roads in the United States during that period, or 54 per cent in favor of the Cincinnati, New Orleans & Texas Pacific in the matter of increase.

"The following table shows number of tons of freight carried per mile of line by the Cincinnati, New Orleans and Texas Pacific, as compared with the Southern Railway, Groups 2 and 3, and the average in the United States:

	1904.	1905.	1906.
Cincinnati, New Orleans & Texas Pacific .....	2,038,497	2,163,643	2,636,587
Southern .....	449,203	467,477	527,031
Group 2.....	2,059,168	2,200,372	2,443,924
Group 3.....	1,379,785	1,457,855	1,713,615
Average, United States .....	829,476	861,396	982,401

"The ratio of expenses to operating income of the Cincinnati, New Orleans & Texas Pacific for 1904, 1905 and 1906 is shown in the following table, as well as a comparison with the Southern Railway and Groups 3 and 5, which Groups cover the territory involved in these complaints:

	1904.	1905.	1906.
Cincinnati, New Orleans & Texas Pacific .....	73.41	73.65	72.98
Southern .....	70.30	69.99	71.35
Group 3.....	74.52	73.68	70.57
Group 5.....	70.66	71.34	73.04

“For the years 1906-7 the net earnings of the Cincinnati, New Orleans & Texas Pacific were \$6,746 and \$5,769, respectively, per mile of line, and of the Southern Railway \$2,084 in the former year and \$1,801 in the latter.

“The Louisville & Nashville during the year ended June 30, 1907, averaged gross earnings per mile of \$11,207.67, while the main line from Louisville to Nashville earned \$30,562.28, the Nashville-Decatur division, \$25,227.72, and the Cincinnati to Louisville division, \$24,618.15. The average of the whole system was lowered **by numerous unprofitable branch lines**, one of which earned only \$718.48. The suggestion is made that the influence of these branch lines should be considered in its effect upon the whole system. To a certain extent this is true, **but a complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier has seen fit to load itself down with such losing properties, many of which in the present instance are far removed from the seat of complaint.**

“The gross earnings of the Nashville, Chattanooga & St. Louis in that year averaged \$9,882 per mile and the earnings of its main line from Hickman, Ky., to Chattanooga were \$20,295 per mile.

“Numerous other statistics, both from this record and from the Commission's files, might be produced, but I shall merely point out by way of comparison that the first class rate from New York to Chicago, a distance of about 900 miles, is 75 cents, or 1 cent less than the Cincinnati to Chattanooga rate for 336 miles, and the local first class rate from Chicago to Cincinnati, a

distance of 298 miles, is 40 cents. Objection possibly will be made to this comparison, because the carriers do not operate in the same general territory. **The only object, however, in so confining a comparison is to consider the respective rates in the light of substantially similar circumstances and conditions of carriage.** Reference to tables of earnings, density of traffic, etc., herein will show that these rates are made under transportation conditions less favorable in these respects than the rate from Cincinnati to Chattanooga. Only Group 2, embracing the eastern half of the New York-Chicago haul, approximates the defendant's high standard of general transportation conditions, and Group 3 is far below that standard. Under these circumstances this comparison with the highly competitive Official Classification territory should go far toward convincing that the rates in issue are greatly in excess of a reasonable charge.

"It is stated in the report that:

" 'If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment we think the complainants have established their case, and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission.'

"Plainly then some very substantial reasons should be advanced for denying the relief asked

for, bearing in mind, of course, the general conditions in this territory and having due regard for the interests of other routes. This suggestion in my opinion is not met by apprehension of injustice to the Louisville & Nashville and Nashville, Chattanooga & St. Louis, **whose financial condition is not shown to require less remedial action**, or by the reasoning by which it is sought to show that the middle west magnifies its troubles or by which the eastern carriers are absolved from all responsibility for the existing conditions."

The facts detailed by Mr. Commissioner Clements are further elucidated by Exhibit C (Record Case 773, p. 96, stipulated into case No. 774, Record Case No. 774, p. 90).

It will be noticed from the foregoing quotation from the dissenting opinion of *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane* in the case at bar (Record Case No. 773, p. 90, 18 I. C. C. R., 474, lines 3 to 6 from bottom of page) that "the only object, however, in so confining a **comparison** is to consider **the respective rates in the light of substantially similar circumstances and conditions of carriage**" is in harmony with everything ever said by the Commission from the time of its creation in 1887 (referred to by Mr. Moore in his brief, p. 34) down to the decision of a majority of the Commission in the case at bar. This quotation from the dissenting opinion in the case at bar further emphasizes the fact (if such fact could possibly be more

emphatically emphasized than it is in the majority opinion of the Commission in the case at bar) that the opinion of a majority of the Commission in the case at bar was a radical departure from anything ever said by the Commission prior to that time (see this brief, p. 74).

The fallacy of the majority opinion of the Commission in the case at bar of **applying a common rate or insisting that the same rate should be applied under dissimilar traffic and transportation circumstances and conditions of carriage AND for the purpose of fixing a schedule of rates just and reasonable in a popular sense for the general good in distributing industries and population over numerous unprofitable branch lines beyond and thousands of miles away from the section involved and not just and reasonable in a legal sense as having regard to the service rendered by the carrier performing it**, is emphasized in the latest opinion of this Court January 9, 1911, Case No. 451, *Interstate Commerce Commission vs. Union Pacific Railway Co.*; Case No. 452, *Interstate Commerce Commission vs. Northern Pacific Railway Co.*; and Case No. 453, *Interstate Commerce Commission vs. Great Northern Railway Co.*, which will be cited from the paging as it appears in the hands of the Clerk of this Court in a subsequent part of this brief.

## (f)

**Sound Inductions (neither too broad nor too narrow) from Facts in Cases Decided before Case at Bar.**

A sound induction (neither too broad nor too narrow), from the facts in cases decided by the Commission prior to the decision of a majority of the Commission in the case at bar, shows that it is proper to fix a common rate on the same commodity transported between the same termini by competing lines between the same two termini when the competing lines perform the service under substantially similar traffic and transportation circumstances and conditions.

To establish a common rate for two or more competing carriers for the transportation of the same commodity between the same termini under substantially similar transportation and traffic circumstances and conditions is in absolute harmony with Section 1 of the Act to Regulate Commerce approved February 4, 1887, and Acts amendatory thereof and supplementary thereto as interpreted, construed and applied by the Supreme Court of the United States because the charge for the service in each case would necessarily be the same and there being a coincidence of two charges, the two charges would become a common charge and such charge would be a charge for the service rendered and if either were just and reasonable for one it would be just and reasonable for the other.

## (g)

**Fundamental principle under which a common rate may be applied in Harmony with Section 1 of the Act to Regulate Commerce as Construed, Interpreted and Applied by the Supreme Court of the United States that the charge for the service rendered must be just and reasonable having regard to the service performed by the carrier performing it. Majority of the Commission in the case at bar in the powers exercised by said majority in fixing a rate as just and reasonable in a popular sense violated this fundamental principle.**

That the fundamental principle under which a common rate may be applied is in harmony with Section 1 of the Act to Regulate Commerce of February 4, 1887, and Acts amendatory thereof and supplementary thereto as construed, interpreted and applied by the Supreme Court of the United States that the charge for service rendered must be just and reasonable having regard to the service performed by the carrier performing it is demonstrated by a sound induction (neither too broad nor too narrow) from the facts in cases decided by the Commission prior to the decision of a majority of the Commission in the case at bar. This has been demonstrated in this brief (this brief, pp. 54-74) and the

radical departure therefrom has been set forth in this brief (pp. 74-85).

In the case at bar the rates in controversy were class rates between Cincinnati and Chattanooga.

In the case at bar the two termini were Chattanooga and Cincinnati.

In the case at bar the distance from Cincinnati to Chattanooga over the C. N. O. & T. P. Ry. Co. was 336 miles main line without branches and over a fragment of the L. & N. Railroad and a fragment of the N. C. & St. L. Railroad 450.9 miles, the difference in mileage being equalized by a common factor, to wit, substantially similar gross revenue per mile.

**A mere fixing of a common schedule of rates on classes from Cincinnati to Chattanooga over either the C. N. O. & T. P. Ry. Co. on the one hand, and a fragment of the L. & N. plus a fragment of the N. C. & St. L. on the other hand, is not the ground of complaint. Because of a substantial similarity of traffic and transportation circumstances and conditions a common rate was proper, but the ground of complaint is the disregard of the law in reaching this common rate.** The fact of similar circumstances and conditions of the two competing lines from Cincinnati to Chattanooga pointed out both by a majority of the Commission and a minority of the Commission lay in the common factor that



the gross earnings per mile were substantially the same, and in the further fact that the transportation over the C. N. O. & T. P. Ry. Co. was by the main line of that road and the transportation over a fragment of the L. & N. plus a fragment of the N. C. & St. L. were over the main lines of those two roads. The fallacy of a majority of the Interstate Commerce Commission was in ignoring the limitations laid down uniformly by the Commission prior to that time in all the cases cited by Mr. Moore and in the additional cases not cited by Mr. Moore but cited by us in this brief. What the majority of the Commission said in the case at bar they had never said in their annual reports or in any case ever before decided by the Commission. It will be seen in the case at bar as set forth in Exhibit B attached to and made part of the Bill of Complaint (Record Case No. 773, p. 95 stipulated into Case No. 774, p. 90 and attached to our main brief as Exhibit B) that the L. & N. Railroad extends from Cincinnati to New Orleans. It will also be seen that the C. N. O. & T. P. Ry. Co. extends from Cincinnati to Chattanooga and if we add to this road connecting carriers there might be through transportation to New Orleans. There would therefore be two competing lines from Cincinnati to New Orleans. In a controversy as to a schedule of rates on class goods from Cincinnati to New Orleans (this being the *factum probandum* in the hypothetical case suggested) the Commission might prescribe a common rate from Cincinnati to New Orleans for the two competing lines from Cincinnati to New Orleans if the two

competing lines were operating under substantially similar transportation and traffic circumstances and conditions. But this is not the case at bar nor were these principles applied by a majority of the Commission in the case at bar. *Mr. Commissioner Prouty*, after showing substantially similar transportation or traffic circumstances or conditions of the two competing lines from Cincinnati to Chattanooga, said (Record Case No. 773, p. 81, 18 I. C. C. R., 465): "Now in adjusting the rates of the **Louisville & Nashville or the Nashville, Chattanooga & St. Louis**, shall the Commission consider each section of the road by itself **or shall it establish a common rate for the whole?** The Commission rates are usually the same for all lines, both main lines and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch line business when it reaches the main line is surplus traffic from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves."

It may not be amiss in this connection to call attention to the fact that **the L. & N. Railroad does not run to Chattanooga** but runs through Nashville continuing its course southward to New Orleans and Pensacola and northwest to St. Louis with innumerable branches and divisions 150 in number as set forth in detail in the Bill of Complaint (Record Case No. 774, pp. 20-23). Nor may it be amiss in this connection to call attention to the

fact that the N. C. & St. L. does not extend to Cincinnati and consists of some 15 divisions and branches as specifically set forth in the Bill of Complaint (Record No. 774, p. 23). It is also an admitted fact in the case, as admitted by the demurrer and as set forth by *Mr. Commissioner Clements* in his dissenting opinion concurred in by *Mr. Commissioner Lane* (Record Case 773, p. 90), that both the L. & N. and the N. C. & St. L. maintained numerous unprofitable branch lines one of which earned only \$718.48 per mile. It is admitted by a majority of the Commission that beyond the line from Cincinnati to Chattanooga the earnings were dragged down from \$25,000 per mile to about \$11,000 per mile on the L. & N. over 4065.35 main line and branches and to less than \$10,000 per mile on the N. C. & St. L. over 1079.05 miles main line and branches. It must be remembered that the extreme termini on the L. & N. were Cincinnati and New Orleans and on the N. C. & St. L. Paducah, Ky., and Atlanta, Ga. Then keeping in mind that the termini of the C. N. O. & T. P. Ry. Co. were Cincinnati and Chattanooga there is now absent every element in every case decided by the Commission before the decision in the case at bar wherein the Commission said they would apply a common rate as follows:

- (1) Mileage;
- (2) Revenue Per Mile;
- (3) Common Termini;
- (4) Main Line as against Branch Lines; and
- (5) Schedule of rates for the same commodity between the same common termini.

(6) Substantial similarity of transportation and traffic circumstances of carriage.

In the case at bar it would therefore be an absolute violation of everything said by the Commission to establish a common rate for the L. & N. Railroad and the N. C. & St. L. Railroad main line and numerous unprofitable branches for the avowed purpose of diffusing industries and population over said main lines and said unprofitable branch lines for the purpose of thus adjusting the rates of the L. & N. Railroad and the N. C. & St. L. Railroad under conceded and admitted entirely dissimilar traffic and transportation circumstances, conditions of mileage, revenue per mile, termini, main line and branch lines. **A majority of the Commission said that they would adjust the rates over the entire mileage main line and branches of the L. & N. Railroad and the N. C. & St. L. Railroad 5134.35 miles with the conceded numerous unprofitable branches with the low revenue per mile between different termini and ascertain a rate therefor and apply the same in common to admitted and conceded different transportation or traffic circumstances and conditions**

from Cincinnati to Chattanooga with an entirely different revenue per mile and an entire absence of branch lines, and all done with the avowed and express purpose of making a rate which in a popular sense would be just and reasonable because in the public interest to diffuse population and industries while in the legal sense unjust and unreasonable and having no direct or reasonable connection with the mandate of Section 1 of the Act to Regulate Commerce and the Acts amendatory and supplementary thereof as interpreted, construed and applied by the Supreme Court of the United States that the charge for the service must be just and reasonable having regard to the service performed by the carrier performing it. (This brief, p. 51). The substantial similarity of transportation or traffic circumstances and conditions of competing lines between Cincinnati and Chattanooga is set forth in the diagram to the Bill of Complaint (Record Case No. 773, p. 26; Record Case No. 774, p. 26; Exhibit X attached to our main brief) and if considering the whole situation directly, logically and reasonably applicable thereto, the Commission had merely prescribed a common rate for the competing lines between Cincinnati and Chattanooga we would not be here complaining, but we are earnestly and vigorously complaining because the Commission has vio-

lated every limitation laid down by the Commission before the decision in the case at bar and violated Section 1 of the Act to Regulate Commerce by fixing a rate which in their judgment was just and reasonable in a popular sense as promoting a public policy in distributing industries and population over thousands of miles of main line and unprofitable branches under entirely dissimilar traffic or transportation circumstances or conditions.

In *Rice, Robinson and Witherop vs. Western N. Y. & P. A. R. R. Co.* (December 2, 1888), 2 I. C. R., 298, cited by Mr. Moore (his brief, pp. 234-235) and fully analyzed in this brief (this brief, p. 55), the Commission condemned the application of an oil rate over a part line as a common rate to be applied to a rate on oil over a short **local** railroad line with a small volume of business because of dissimilar transportation and traffic circumstances and conditions and stated that the traffic and transportation circumstances and conditions of a **local** line with a small volume of business should be given "**controlling weight.**"

In *Rend vs. C. & N. R. R. Co.* (January 26, 1889), 2 I. C. C. R., 318, cited by Mr. Moore (his brief, pp. 35-36) and fully analyzed in this brief (this brief, p. 57), applied a group rate solely upon the ground of one route being substantially a fair equivalent of the other.

In *Shippers' Union of Phoenix vs. A. T. & S. F. Ry. Co.* (June 4, 1902), 9 I. C. C. R., 25, cited by Mr. Moore (his brief, p. 36), and fully analyzed in this brief (this brief, p. 58), the Commission refused to

apply a common rate because of the dissimilar traffic and transportation circumstances and conditions of one line being affected by water competition and the other not being so affected. **In the case at bar the C. N. O. & T. P. Ry. Co. was not affected by unprofitable branch lines but the L. & N. Railroad which did not extend to Chattanooga and the N. C. & St. L. Railroad which did not extend to Cincinnati were both materially affected by numerous unprofitable branch lines which dragged down their revenue over their 5134.35 miles more than 60 per cent.**

*In Matter of Proposed Advances in Freight Rates* (April 1, 1903), 9 I. C. C. R., 382, cited by Moore in his brief (pp. 36-37) and fully analyzed in this brief (this brief, p. 60), the Commission prescribed a common rate only as between the same two termini **and only as to the two strong lines, namely, the Pennsylvania Railroad and the New York Central Railroad** and declined to go further or enter into an examination of the financial showing of the Erie Railroad, Baltimore & Ohio Railroad, Wabash Railroad, Southern Railroad, Norfolk & Western Railroad, C. & L. Railroad and other railroads which appeared before the Commission represented as appears from the report of the case by presidents, vice-presidents, traffic managers, general managers, general freight agents and general counsel.

*In Evans vs. Union Pacific Railroad Company*

(February 8, 1896), 6 I. C. R., 520, fully analyzed in this brief (this brief, p. 64), which Mr. Moore failed to cite in his brief (which failure together with numerous other failures herein recited makes his inductive development of the so-called weak roads argument defective and worthless) held that a common rate could only be prescribed when there existed **"substantial similarity in transportation conditions."**

In *Memphis Freight Bureau vs. Fort Smith & Western R. R. Co.* (December 9, 1907), 13 I. C. C. R., 1, not cited by Mr. Moore and fully analyzed in this brief (this brief, p. 65), the Commission held that a common rate could only be prescribed when there existed substantially similar traffic and transportation conditions.

In *Hydraulic Pressed Brick Co. vs. St. L. & S. F. R. R. Co.* (April 6, 1908), 13 I. C. C. R., 342, at pp. 347-348, which was not cited by Mr. Moore and which is fully analyzed in this brief (this brief, p. 65), the Commission held that a common rate should not be prescribed for two lines even between the same termini where there were substantially different traffic and transportation conditions by reason of a longer route and that a schedule of rates should be prescribed for the line whose rates were in controversy which should be just and reasonable having regard to the service of the line performing the service and that the other line was at



liberty to adjust its rates thereto if it so desired, but that the Commission would not prescribe a common rate for both lines.

The omission of Mr. Moore to cite this case in his brief is remarkable for two reasons: the *first*, because it is a clean-cut analysis of the so-called weak roads argument; and in the second case it was concurred in by the unanimous vote of the Commission consisting of *Commissioner Knapp, Commissioner Clements, Commissioner Prouty, Commissioner Cockrell, Commissioner Lane, Commissioner Clark and Commissioner Harlan*. Any induction in an attempt to ascertain the theory of the Interstate Commerce Commission as to a common rate as involved in the so-called weak-roads argument is defective which omits to note the facts and the unanimous opinion of the Commission thereon as involved in this case. *Mr. Commissioner Clements* read the opinion in this case and it clearly demonstrates that a majority of the Commission in the case at bar, over the powerful and vigorous protest of *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane*, radically departed from everything which had been previously said by the Commission as to common rates particularly as pertaining to the so-called weak-roads argument.

In *Rhineland Paper Co. vs. N. P. Ry. Co.* (June 8, 1908), 13 I. C. C. R., 633, not cited by Mr. Moore in his brief, and fully analyzed in this brief (this brief, p. 66), the Commission pointed out that a comparison of rates, and therefore the application

of a common rate, could not be made unless the traffic and transportation conditions were substantially similar.

In *City of Spokane vs. N. P. Ry. Co.* (Feb. 9, 1909), 15 I. C. C. R., 376 (also May 3, 1909, 16 I. C. C. R., 179; also June 7, 1910, 19 I. C. C. R., 162, and again June 22, 1911, 21 I. C. C. R., 400) afterwards in the Commerce Court and now in the Supreme Court of the United States the Commission (and fully analyzed in this brief, pp. 67 and 69) confined itself to a schedule of rates on the same commodities between the two termini, St. Paul and Spokane, and confined its investigation as to a common rate to but two lines directly serving these two termini, to-wit, the Great Northern and Northern Pacific just as it had confined itself to the Pennsylvania and the New York Central in *Re Proposed Advance in Freight Rates*, *supra*.

In *Kindel vs. N. Y., N. H. & H. R. R. Co.* (March 2, 1909), 15 I. C. C. R., 555, fully analyzed in this brief (this brief, p. 70), the Commission confined itself to the transportation and traffic circumstances and conditions between two termini and did not wander thousands of miles covering more than ten times the mileage than the mileage between the two termini, upon any theory of any power possessed by the Commission to make just and reasonable rates in a popular sense (this brief, p. 51) on what in the judgment of the Commission was good public policy

in diffusing industry and population, but confined itself to a consideration of what in a legal sense were just and reasonable rates between the two termini (this brief, p. 51).

In *Board of Trade of Winston-Salem vs. N. & W. Ry. Co.*, cited by Mr. Moore in his brief (his brief, p. 39), and fully analyzed in this brief (this brief, p. 71), Mr. Moore as counsel for the N. & W. Ry. contended that there could not be a common rate for transportation over a BRANCH line for similar transportation over a MAIN line. The Commission sustained Mr. Moore's contention and held that the transportation in one case being over a MAIN line and in the other case over a BRANCH line of itself made out dissimilarity of transportation and traffic circumstances and conditions.

In *Chicago Lumber and Coal Co. vs. T. S. Ry. Co.* (May 4, 1909), 16 I. C. C. R., 23, not cited by Mr. Moore and fully analyzed in this brief (this brief, p. 73), the Commission held that each case must be decided upon its own merits and that the same rate could not be prescribed where there existed dissimilar transportation and traffic circumstances and conditions.

In *Colorado Bedding Co. vs. C. B. & Q. R. R. Co.* (May 9, 1910), 18 I. C. C. R., 403, which was not cited by Mr. Moore, and fully analyzed by us in this brief (this brief, p. 74), the Com-

mission held that the lower rate by competing line does not of itself show the necessity for a common rate for both. This decision negatives any presumption that because there is a rate over one line that a different rate over another line between the same termini for the transportation of the same commodity is just and reasonable **and the absence of any such presumption is fortified and made absolutely conclusive in the case at bar because the unanimous Commission by unanimous vote condemned the "76-cent schedule" of rates in the case at bar.**

In *Ashland Fire Brick Co. vs. Southern Railway Co.* (December 11, 1911), 22 I. C. C. R., 115, in which Mr. R. Walton Moore appeared as counsel for the Southern Railway Co. and which he does not cite in his brief and which we cited in our main brief (main brief, p. 169) the second proposition of the syllabus is as follows:

**"Power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as part of one great whole, apportion to each a certain territory, or to require all to meet upon a common basis at all points. As to the charges of undue preference or unjust discrimination made against defendants the Commission cannot find that they are guilty in this instance."**

In the case just cited, *Mr. Commissioner Lane's* exact language (p. 121) was transposed and carried into the syllabus.

In Case No. 451, *Interstate Commerce Commission vs. Union Pacific Railroad Co.*; Case No. 452, *Interstate Commerce Commission vs. Northern Pacific Co.*; Case No. 453, *Interstate Commerce Commission vs. Great Northern Railway Co.*, decided by this Court January 9, 1912, *Mr. Justice Lamar* said in his statement of the case (at p. 1), that:

"The tariffs under consideration involve rates on lumber from the coast Spokane district and Montana-Oregon points to St. Paul, Omaha and Chicago."

After detailing the action of the Commission in fixing rates *Mr. Justice Lamar* further said, as a part of the statement of the case (at p. 3), that:

"The carriers thereupon filed separate bills to enjoin this order and repeated therein the contentions made before the Commission; averred that the old forty-cent rate to St. Paul and the fifty-cent rate to Omaha were not only unremunerative but proportionally so much lower than the rates on other merchandise as to amount to an unjust discrimination."

*Mr. Justice Lamar* also said (at page 3):

"There was some evidence that the cost of handling freight over the Union Pacific was greater than over the Northern lines because it crossed the mountains at a point 2,000 feet

higher than they did. But the Master found as a fact that the traffic conditions were substantially the same over the three roads, and that the distance from the Coast to Omaha was 1,800 miles and to St. Paul 2,052 miles, and thereupon held, as a matter of law, that when the Commission fixed 50 cents as a reasonable rate to Omaha over the shorter line, it necessarily followed that the lower rate of 45 cents over the longer line to St. Paul was not only unreasonable but unjust."

*Mr. Justice Lamar* quoted (at page 4) the language of the order of the Circuit Court as follows:

"All the exceptions to the report of the Master must be overruled. Those which challenge his findings that the reduction by the Interstate Commerce Commission of the 50-cent rate on lumber to St. Paul and other points east of the Pembina line was arbitrary, and so palpably unjust and unreasonable, and so discriminatory that it was beyond the power of the Commission, are overruled; on the ground that this action of the Commission was beyond its power or so palpably and gravely unjust and unreasonable as to be beyond the substance, if not beyond the form of its power.' "

*Mr. Justice Lamar*, speaking more directly to the point as to similarity of traffic and transportation circumstances and conditions of carriage (at page 7), said:

"And this brings us to a consideration of the Master's finding, approved by the Circuit Court, that in fixing a rate of forty-five cents to St. Paul, the order, on its face, was void be-

cause, with traffic conditions over the three roads practically the same, the Commission allowed the high rate of fifty cents to the short route and the low rate of forty-five cents to the long route. It was argued that when the Commission had adjudged that a rate of fifty cents for 1,800 miles was reasonable it was manifestly unreasonable to allow a rate of forty-five cents for 2,052 miles, and that such order was so palpably unjust and so unreasonable as to be beyond the substance if not beyond the form of the Commission's power.

**"It does not follow, as a matter of law, that rates should be the same for the same distance over two different roads, and this would be especially true if the cost of transportation was greater over the Union Pacific than over the northern lines, because it crossed the mountains 2,000 feet higher than they.**

"But, with the Master's finding that traffic conditions were practically the same, it might be that the order would appear unreasonable on its face, for it fixes a higher rate over the short route and a low rate, with less revenue per ton per mile over the long route.

**"But the order cannot be considered by itself alone. It must be read in the light of the entire record, including the important fact, that the carriers themselves, in making these rates, made a similar difference between the long and the short lines. By their own tariffs they clearly show that they did**

**not consider mere distance a controlling factor in fixing the rates now under attack. And this is not exceptional for it appears that they make rates from basing points to common points with the result that two cars of lumber of the same weight, maybe shipped from the same place, over the same line, at the same rate, to different points, and that the distance one car is hauled may be several hundred miles greater than the other.**

“But the fact that the carriers themselves, in 1893, 1901 and 1907 charged more to Omaha than to St. Paul is a much weightier fact in considering this attack on the order. In making the difference between these two cities the Commission only did what the carriers themselves had done under their old and new rate. After 1901, the rate to Omaha was fifty cents and the rate to St. Paul, over the longer route, was forty cents. In the year 1907 tariff now under consideration, the rate to Omaha, over the short route, was fixed by them at fifty-five cents; and that to St. Paul, over the longer route, was fixed at fifty cents. This was a difference of five cents in favor of the short route. The Commission made the same difference in favor of the same road.

“This difference is supported by what the record shows as to rates to points on the Pembina line. Inasmuch as no appeal was taken from the refusal to enjoin their restoration, we must assume that the parties admit these rates to be reasonable. But there was a difference as to rates to points on this line which shows that



the per mile ratio cannot be regarded as necessarily standard. For example, the rate to Omaha, on the lower part of this line, was fifty cents, while the rate to points on the northern end was forty cents. **This was a difference of twenty per cent in favor of Omaha, although there was no such difference in the distance.** Again, timber shipped from the Coast to St. Paul passed through this forty-cent point on the northern end of the Pembina line. The distance from the Coast to St. Paul was one-eighth greater and the advance allowed was one-eighth, or five cents, over the forty-cent rate. It is quite true that the carriers may do what they cannot be compelled to do; but it is not to be assumed that they made and continued these different rates between these two cities arbitrarily and without reason. It was proper for the Commission to consider the weight and character of these reasons and the causes which prompted and justified the carriers in charging these different rates. When the Commission maintained the same ratio or difference as that made by the carriers themselves, it cannot be fairly said that such an order was so arbitrary as to be palpably and gravely unjust, and beyond the substance, if not the form of its power."

This latest expression of opinion by the Supreme Court of the United States (January 9, 1911) delivered through *Mr. Justice Lamar* is in harmony with everything said by the Interstate Commerce Commission prior to the opinion of the majority of the Commission in the case at bar, that a common rate

should be applied under substantially similar traffic and transportation circumstances and conditions of carriage and a different rate prescribed under substantially dissimilar traffic and transportation circumstances and conditions of carriage.

(h)

Although it is admitted and conceded by the Record and by a majority of the Commission in the case at bar, emphasized by the minority opinion of the Commission in the case at bar, that the traffic and transportation circumstances and conditions of the C. N. O. & T. P. Ry. from Cincinnati to Chattanooga a single trunk line 336 miles long without branches are dissimilar to the traffic and transportation circumstances and conditions of the Louisville & Nashville 4365.20 miles of main line and numerous unprofitable branches and of the N. C. & St. L. Ry. 1230.05 miles main line and numerous unprofitable branches yet the Commission not merely considered these lines but rested its decision of making a common rate not for the sections of said two last named lines between Cincinnati and Chattanooga but upon the whole of said last two lines and applied said common rate to said C. N. O. & T.

**P. Ry. Co. upon the ground that such rate would be just and reasonable (in a popular sense) as in the public interest that rates should be so adjusted that population and industries might diffuse themselves and did not rest its decision upon a just and reasonable rate having regard to the carrier performing the service between Cincinnati and Chattanooga, to-wit, said C. N. O. & T. P. Ry. Co. 336 miles on the one hand, and two fragments of said L. & N. Railroad and said N. C. & St. L. Railroad 450.9 Cincinnati to Chattanooga, on the other.**

The statements of fact contained in the foregoing headline to this part of the brief are set forth in the bill of complaint and admitted to be true by the demurrer thereto. The order of the Commission was made in reference to the foregoing admitted and conceded facts and that a majority of the Commission did not merely consider these as proper circumstances to be considered, but rested their decision thereon, is apparent from the opinion of the majority of the Commission set forth in this brief (this brief, pp. 75-76) and emphasized by the minority of the Commission (this brief, pp. 77-83).

That the exercise of the power in fact exercised by the Commission was not within the powers of the Commission will be made even plainer by reference to the line of the L. & N. Railroad as a whole as set forth in Exhibit B attached to and made a part of

the bill of complaint and admitted to be true by demurrer and for convenience attached to the main brief Exhibit B.

Sections of the L. & N. may be illustrated as follows:

Myrtlewood, Ala., to Pensacola, Fla.  
 Georgiana, Ala., to Graceville, Fla.  
 Pensacola, Fla., to River Junction, Fla.  
 Columbia, Tenn., to Tuscombina, Ala.  
 St. Louis, Mo., to Evansville, Ind.  
 McClainsboro, Ill., to Shawneetown, Ill.  
 Memphis, Tenn., to Humboldt, Tenn.

A shipper at Cincinnati, O., desires to ship his goods to Chattanooga, Tenn., over the C. N. O. & T. P. Ry. Co. a single trunk line without branches 336 miles long. The query presents itself, Shall the rate for that transportation service to be just and reasonable (in its legal sense) with reference to the service performed for him by the C. N. O. & T. P. Ry. Co.? Or, Shall a common rate be made for the entire L. & N. Railroad and N. C. & St. L. Railroad by adding together all of their sections, main line and numerous unprofitable branches, and such common rate be applied to the C. N. O. & T. P. Ry. as a rate just and reasonable (in a popular sense) in aid of a general scheme of public policy to diffuse industries and population over the whole L. & N. Railroad and whole N. C. & St. L. R. R. by adding together the various sections, main line and numerous unprofitable branches? This is exactly what a majority of the Interstate Commerce Com-

mission said they did and upon which they rested their decision in fixing a "70-cent schedule" of rates over the C. N. O. & T. P. Ry. when *Mr. Commissioner Prouty* said (this brief, p. 76): "Now in adjusting the rates of the Louisville & Nashville or the Nashville, Chattanooga & St. Louis shall the Commission consider each section of the road by itself or shall it establish a common rate for the whole?"

\* \* \* It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves." It was this that called forth the vigorous protest of *Mr. Commissioner Clements* concurred in by *Mr. Commissioner Lane* (this brief, p. 81) that: "The average of the whole system [L. & N. and N. C. & St. L.] was lowered by numerous unprofitable branch lines one of which earned only \$718.48. \* \* \* A complainant city is not to be deprived of the benefits of its location and natural advantage simply because a carrier [L. & N. R. R. Co. and N. C. & St. L. Ry. Co.] has seen fit to load itself down with such losing properties many of which in the present instance are far removed from the seat of complaint."

In the *Willamette Valley Case* (*Southern Pacific Co. vs. The Interstate Commerce Commission*, 219 U. S., 433) the Supreme Court of the United States, by an examination of the testimony taken before the Commission notice from a dialogue participated in by two members of the Commission and Mr. Teal, attorney for the shippers, that Mr. Teal wanted the old rates preserved because those rates were just and reasonable in the popular sense on equitable

considerations because money has been invested in saw mills, etc., on the faith of the old rates. *Mr. Justice Lamar* called attention to this fact in his opinions in cases No. 451, 452 and 453, *Interstate Commerce Commission vs. Union Pacific Railroad Company, et al.*, decided January 9, 1912 (at page 9 of his opinion).

In the case at bar we have a distinct avowal on the part of a majority of the Interstate Commerce Commission in its report which by express language is made part and parcel of the order (Record Case No. 774, p. 12) that they exercised the powers hereinbefore stated and made the same the basis and ground of their decision.

In cases No. 451, 452 and 453, *Interstate Commerce Commission vs. Union Pacific Railroad Company, et al.*, *Mr. Justice Lamar* (at page 9), said:

"It is true, also, that the Commission [in the case he was deciding] examined into the effect of the old and the new rate on carrier and lumber men alike. **But we do not find that it made the order because of the effect on the lumber industry.**

"In the *Willamette* case (219 U. S., 445), counsel for the middlemen admitted that the rate there under attack was reasonable in and of itself, but insisted that statements of officers and the action of the carrier operated to estop the road from raising the low rate up to a reasonable rate.

"Nothing of the sort is found here. The rates were attacked as unreasonable, and, on evidence already referred to, the Commission found that

the old rates of the Pembina line were reasonable and should not be changed, but that there might be a reasonable increase to points east of that line, not to exceed five cents."

*Mr. Justice Lamar*, then (at page 9), calls attention to the fact that the Commission did speak of the lumber interests, **and further particularly calls attention to the fact that the Commission distinctly said that they would not decide the case upon the ground that the lumber interests had been built up under the old rates, but that they would decide the case exclusively on the question of the justness or the reasonableness of the rates themselves.**

*Mr. Justice Lamar* concludes his opinion (at page 10) as follows:

"Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumptions arising from the long continuance of the low rate, when the carrier was earning dividends, nor that there was no evidence to support the findings. **If so**, the Commission acted within its power, and in view of the statute, its lawful orders cannot be enjoined."

In cases No. 451, 452 and 453, *Interstate Commerce Commission vs. Union Pacific Railroad Co., et al.*, decided January 9, 1912, the Supreme Court

of the United States, reached the only conclusion it could have reached in view of the distinct assertions made by the Commission, to which *Mr. Justice Lamar* calls attention, that they did not exercise their power because of the effect on the lumber industry, but merely exercised the power of making a just and reasonable rate (in the legal sense), having regard to the service rendered by the carrier performing it.

The case at bar is therefore even stronger than the *Willamette Valley Case*, *supra*, because in that case the exercise of power exercised by the Commission of fixing a just and reasonable rate (in a popular sense, this brief, p. 51) was discovered by a statement of the attorney for the shippers in a dialogue with two members of the Commission, **while the case at bar it is found in the report of a majority of the Commission expressly made part and parcel of the order (bill of complaint, paragraph 31, Record Case No. 774, p. 12).**

(i)

**Effect of Lowering of Schedule of Rates from Cincinnati to Chattanooga.**

The lowering of a schedule of rates from Cincinnati to Chattanooga might or might not have the effect of lowering other rates and while a matter proper to be taken into consideration by the Commission could not be made the ground or basis of the decision of the majority of the Commission. If it



could not have been or was an influencing circumstance **it was not so alone and apart** (Main Brief, p. 83) from the power in fact manifested and exercised by the Commission in fixing a schedule of rates just and reasonable (in a popular sense) as has been heretofore pointed out, to-wit, not fixing a schedule of rates just and reasonable having regard to the service rendered by the carrier performing such service, but just and reasonable (in a popular sense) in that it subverted a public policy of diffusing industries and population over thousands of miles of numerous unprofitable branch lines of the L. & N. Railroad and the N. C. & St. L. Railway. If the lowering of a rate from Cincinnati to Chattanooga would tend to effect a lowering of other rates then the effect of the unanimous condemnation by the Commission of the "76-cent schedule" of rates was to tend to lower other rates and therefore it is to be presumed that the Commission intended that it should have such tendency. It is stated by the majority of the Commission and reiterated by Mr. Moore in his brief (p. 12) that a lowering of rates was the frank admission of the Cincinnati shippers. That high crime and misdemeanor, thus attributed to the Cincinnati shippers, was thus participated by the entire Commission as *particeps criminis* when the entire Commission united in condemning a "76-cent schedule" of rates and agreed that this schedule was excessive and should be lowered. That a schedule of rates just and reasonable (in a legal sense) as having regard to the service rendered by the carrier performing such

service is not objectionable to the law because it may affect other rates was well expressed by *Circuit Judge Taft* concurred in by *Mr. Circuit Justice Harlan* and *Mr. Justice Lurton* (then *Circuit Judge Lurton*) as early as 1899 in *East Tennessee and G. R. R. Co. vs. Interstate Commerce Commission*, 99 Fed. Rep., 52, and as late as April 9, 1910, by *Circuit Judge Severens* concurred in by *Circuit Judge Warrington* and *Circuit Judge Knappen* in *L. & N. Railroad Co. vs. Interstate Commerce Commission*, 184 Fed. Rep., 118, both of which are quoted in our main brief (pp. 154-155) and as summed up in the syllabus in *Interstate Commerce Commission vs. C. R. I. & P. Ry. Co.* (May 31, 1910), 218 U. S., 88, as follows:

“The power of the Interstate Commerce Commission extends to the regulation of rates whether the same be old or new *notwithstanding the interests attached to the rates may have to be changed in case the Commission exercises its power.*”

## VIII.

### **Fallacy of Compelling Reasons as Stated by Majority of Commerce Court by Which Majority of Commission Fixed Order in Case at Bar.**

In the case at bar a majority of the Commerce Court begged the question and entered into no exhaustive line of reasoning itself, but adopted the reasoning of a majority of the Interstate Commerce Commission as follows (188 Fed. Rep., 248):

**“In stating the reasons which in the judgment of the Commission COMPELLED it to take into account in fixing the schedule of rates which it did other considerations and other railroads than the C. N. O. & T. P. Ry. we can do no better than to quote from the report of the Commission as follows”:**

A majority of the Commerce Court then quoted from the majority opinion of the Commission (18 I. C. C. R., p. 462; Record Case No. 773, p. 78), beginning with the words “the defendants also contend” down to the word “excessive” (18 I. C. C. R., p. 462; Record Case No. 773, p. 82, line 2 from bottom of page).

**We call particular attention to the fact that these reasons, stated by a majority of the Commerce Court to be the COMPELLING REASONS which induced a majority of the Commission to fix a “70-cent schedule” of rates, are embraced in the matters heretofore quoted by us in this brief and relied on by us as applied to the admitted and conceded facts in the case (this brief pp. 74-76) at bar.**

**Mr. Moore relies upon these reasons as the compelling reasons** (Mr. Moore’s brief, pp. 13-18). We take it, therefore, that the reasons are coupled together and are not to be treated **apart** from each other (our main brief, p. 83, line 4) and that if in these reasons the Commission fixed a rate as just and reasonable (in a

popular sense) as regards some general policy and equitable consideration to diffuse industries and population and not a schedule of rates as a just and reasonable schedule of rates (in a legal sense) as having regard to the service rendered by the carrier performing such service, that then the Commission while acting in the form of its powers in fact exercised powers not delegated to the Commission and that the **order** fixing a "70-cent schedule" of rates is null and void.

In these reasons a majority of the Interstate Commerce Commission departed from everything it had ever said prior to the decision in the case at bar and contrary to what was subsequently said by the Commission in *Ashland Fire Brick Co. vs. Southern Railway Co.* (December 11, 1911), 21 I. C. R., 115; in direct contravention to the letter and spirit of Section 5 of the Act to Regulate Commerce approved February 4, 1887, against pooling and the decisions of the Supreme Court of the United States in the following cases:

*Willamette Valley Case* (*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S.), *Mr. Chief Justice White*, at pp. 441, 442, 451, 452.

*Peavey Elevation Cases* (*Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S., 42), *Mr. Justice Holmes*, at p. 46.

*Pembina-Port Arthur Lumber Cases* (No. 451, 452 and No. 453, *Interstate Commerce Commission vs. Union Pacific Railroad Co.*) (January 9, 1912), *Mr. Justice Lamar*, at pp. 1, 3, 7 and 9.

**(1) First Illustration.** The first illustration given is (18 I. C. C. R., p. 462; Record Case No. 773, p. 75, line 12 from bottom) as follows:

“The rate from Cincinnati and Louisville to Chattanooga has been the same for the last 28 years. The distance is the same and this *relation* in rates will doubtless be maintained in the future.”

By the conceded and admitted facts and by the opinion of the majority and minority of the Commission the traffic and transportation circumstances and conditions of carriage including such *common* factors as mileage, gross earnings per mile (which connotes a common density of traffic per mile), etc., from Cincinnati to Chattanooga on the one hand and Louisville to Chattanooga on the other being substantially similar a common rate might well be and logically would be prescribed in harmony with Section 1 of the Act to Regulate Commerce of February 4, 1887, and Acts amendatory thereof and supplementary thereto as interpreted by the Supreme Court of the United States that the charge for the service from Louisville to Chattanooga having regard to the service rendered by the carrier performing it would be substantially the same as from Cincinnati to Chattanooga having regard to the service rendered by the carrier performing it. In other words, the factors being the same in each case, the rate would be the same in each case, the just and reasonable rate would be common to both carriers and

therefore a common rate might well be and logically would be applied. But this is exactly what a majority of the Commission did not do and said it would not do and in the reasoning given which a majority of the Commerce Court said (188 Fed. Rep. 248) was the compelling reason, they said they would ascertain a common rate for the whole L. & N. Railroad and the whole N. C. & St. L. Railroad 5,585.25 miles main line and unprofitable branches (18 I. C. C. R., 465; Record Case No. 773, p. 81; relied upon by us in this brief, p. 76) and apply the same to the C. N. O. & T. P. Ry. Co. a single trunk line without branches 336 miles Cincinnati to Chattanooga. This may well be just and reasonable in a popular sense but is not just and reasonable in the sense of Section 1 of the Act to Regulate Commerce approved February 4, 1887 (this brief, p. 51).

*Mr. Commissioner Clements* in his dissenting opinion concurred in by *Mr. Commissioner Lane* (18 I. C. C. R., 475; Record Case 773, p. 91; quoted in this brief, p. 73) said it is "*not shown*" that financial conditions do not require the same remedial action in the illustrations given by a majority of the Commission as in the case at bar and there is nothing said in the opinion of the majority of the Commission to the contrary as was said in a similar matter by *Mr. Chief Justice White* in the *Willamette Valley Case* (219 U. S., at p. 450, lines 3-4 from the top).

**(2) Second Illustration.** The second illustration is Memphis to Chattanooga (18 I. C. C. R., 462, Record Case No. 773, p. 78).

As shown by the map attached to Mr. Moore's brief the route from Memphis to Chattanooga is via Decatur over the Southern Railway and as stated by a majority of the Commission the distance is 300 miles (18 I. C. C. R., 462; Record Case No. 773, p. 78). One of the facts admitted by the demurrer is that the gross earnings of the Southern is \$7,506.00 per mile so that "the Southern Railway produces not one-third of the gross revenue per mile of the Cincinnati Southern [C. N. O. & T. P. Ry. Co.] "(18 I. C. C. R., 473; Record Case No. 773, p. 473, lines 5 and 14-17 from top of page).

Another fact admitted by the demurrer is that the density of traffic to-wit: number of tons of freight carried per mile of line by the C. N. O. & T. P. Ry. was 2,636,587 while for the Southern it was but 527,031 (18 I. C. C. R., 473; Record Case No. 773, p. 89).

Another fact admitted by the demurrer is that the net earnings of the C. N. O. & T. P. Ry. for the years 1906-1907 were \$6,746 and \$5,769 respectively per mile of line and of the Southern Railway \$2,084 and \$1,801 per mile of line for said respective years.

It will therefore be noted by the admitted and conceded facts in the case that the traffic and transportation circumstances and conditions were substantially dissimilar, including mileage, gross earnings per mile, density of traffic per mile and net earnings per mile. In cases No. 451, No. 452 and No. 453, *Interstate Commerce Commission vs. Union Pacific Railroad Co. et al.* decided by this Court January 9, 1912, the Court examined into the Record for the

purpose of ascertaining and determining the substantial dissimilarity between the lines involved in that case. The facts in the case at bar being conceded and admitted, no two minds could draw different conclusions as to the substantial dissimilarity of the traffic and transportation circumstances and conditions in the section between Cincinnati and Chattanooga over the C. N. O. & T. P. Ry. Co. and in the section between Memphis and Chattanooga via Decatur over the Southern Railway.

A majority of the Commission failed to find (because it could not find) any substantial similarity and this was pointed out in the dissenting opinion and nothing is found in the majority opinion to the contrary.

If, for the sake of argument, it be conceded that there were substantial similarity, the same objection exists to this illustration as has been detailed to the first illustration.

**(3) Third Illustration.** The third illustration is Baltimore to Atlanta (18 I. C. C. R., 463: Record Case No. 773, p. 79).

As shown by the map attached to Mr. Moore's brief the route from Baltimore to Atlanta is over the Southern Railroad (except the segment between Alexandria near Washington and Baltimore). As shown by this map and the facts stated under the second illustration the dissimilarity of transportation and traffic circumstances and conditions, including mileage, gross earnings per mile, density of traffic per mile and net earnings per mile is apparent, and



what was said as to illustration second is equally applicable to illustration third.

**(4) Fourth Illustration.** The fourth illustration is Memphis to Birmingham (18 I. C. C. R., 463; Record Case No. 773, p. 79).

As shown by the map attached to Mr. Moore's brief the route from Memphis to Birmingham is over the Frisco Line which line was not a party to and did not intervene in the case at bar nor were the rates over this line from Memphis to Birmingham under investigation as clearly appears from the Record of the Case, including majority and minority report of the Commission. There is absolutely no finding in this case as to the transportation and traffic circumstances and conditions of the section between Memphis and Birmingham over the Frisco Line, and nothing from which to judge whether the circumstances and conditions were similar to the section between Cincinnati and Chattanooga over the C. N. O. & T. P. Ry., but the majority of the Commission itself points out a dissimilarity in the factor of mileage of 20 per cent. This factor alone is not sufficient to determine whether there should or should not be a common rate as decided by this Court January 9, 1912, in cases No. 451, 452 and 453, *Interstate Commerce Commission vs. Union Pacific Railroad Co. et al.*

**(5) The four illustrations combined.** If the four illustrations and any further illustrations that can be extracted from the compelling reasons of the majority of the Commission, it resulted

in a pooling of all these lines and flies in the face of what was said by the Commission in *Chicago Lumber and Coal Co. vs. T. S. Ry Co.* (May 4, 1909), 16 I. C. C. R., 323, at p. 328; and in *Ashland Fire Brick Co. vs. Southern Railway Co.* (December 11, 1911), 22 I. C. C. R., 115, that the law does not deal with carriers collectively; that each case must be decided on its own merits; that power is not lodged in the Interstate Commerce Commission to treat all railroads as part of one great whole or to meet upon a common basis at all points; or, as was said in the *Peavey Elevation Cases* (*Interstate Commerce Commission vs. Diefenbaugh*, 222 U. S., 42, at p. 46) the law does not equalize fortunes, opportunities or abilities, or as said in the *Willamette Valley Case* (*Southern Pacific vs. Interstate Commerce Commission*, 219 U. S., 433), the Commission had no power to prescribe just and reasonable rates in a popular sense; or as said in *The Pembina-Port Arthur Lumber Cases* (No. 451, 452 and 453, *Interstate Commerce Commission vs. Union Pacific Railroad Co.*), it was not proper for the Master and the Circuit Court in affirming him to arbitrarily treat things as substantially similar when on the face of the Record they appear to be substantially dissimilar; or as further said in the *Willamette Valley Case*, *supra* (at p. 452), that "the greater the wrong the lesser the right to redress and the greater the reason for the low and competitive rate the stronger the reason for refusing to fix such a rate."

## IX.

**WILLAMETTE VALLEY CASE (SOUTHERN PACIFIC COMPANY VS. INTERSTATE COMMERCE COMMISSION, 219 U. S., 433) STUDIOUSLY AVOIDED.**

It seems remarkable that neither a majority of the Commerce Court in the case at bar (*Hooker vs. Interstate Commerce Commission*, 188 Fed. Rep., 242) ; Hon. Winfred T. Denison, Assistant Attorney-General for the United States, and Hon. P. J. Farrell, attorney for the Interstate Commerce Commission, do not mention or refer to or attempt to distinguish or in any manner explain or show the non-application to the case at bar of the *Willamette Valley Case* (Southern Pacific Co. vs. The Interstate Commerce Commission, 219 U. S., 433).

Mr. R. Walton Moore, counsel for the C. N. O. & T. P. Ry. Co., in his brief (pp. 6 and 7) merely refers to this case on a proposition as to which we have always and had previously assented (our main brief, p. 71).

Cases No. 451, 452 and 453, *Interstate Commerce Commission vs. Union Pacific Railroad Co., et al.*, decided June 9, 1912, in the opinion of Mr. Justice Lamar (at page 9) reaffirmed the doctrine laid down in the *Willamette Valley Case*, *supra*, and while the facts in the case decided by Mr. Justice Lamar did not fall within the *Willamette Valley Case*, *supra*, the facts in the case at bar come squarely within the facts in the *Willamette Valley Case*, *supra*.

## X.

## IN CONCLUSION.

It is submitted that the Commerce Court had jurisdiction to entertain the Bills of Complaint and in assuming jurisdiction the action of the Commerce Court should be affirmed. It is further submitted, however, that a majority of the Commerce Court erred in sustaining demurrers and motions to dismiss the Bills of Complaint on their merits, and in this respect the Commerce Court should be reversed and this court on appeal in equity should overrule the demurrers and motions to dismiss on the merits and enter the order indicated in the dissenting opinion of *Judge Archbald*, concurred in by *Judge Mack* (188 Fed. Rep., 255), set out and quoted in our main brief (p. 194).

Respectfully,

FRANCIS B. JAMES,  
*Of Counsel.*

LITTLEFORD, JAMES, BALLARD, FROST & FOSTER,  
Nos. 1002-3-4-5 First National Bank Bldg.,  
Cincinnati, Ohio.  
Nos. 805-6-7-8 Westory Building,  
Washington, D. C.,  
*Solicitors.*

January 11, 1912.



JAMES H. MCKENNEY.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1911.

---

No. 773.

JAMES J. HOOKER, ET AL., *Appellants*,

*v.*

MARTIN A. KNAPP, ET AL., *Appellees*.

No. 774.

THE EAGLE WHITE LEAD COMPANY, ET AL.,  
*Appellants*,

*v.*

THE INTERSTATE COMMERCE COMMISSION, ET AL.,  
*Appellees*.

---

**MEMORANDUM  
CALLING ATTENTION TO LEMON RATE CASE.**

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*The Lemon Rate Case (A. T. & S. F. R. R. Co.  
v. Interstate Commerce Commission), 190 Fed.*

Rep., 591 (reported in advance sheets December 14, 1911), was not called to the attention of the court, counsel for appellants being under the impression that same had been appealed to the Supreme Court of the United States by the Interstate Commerce Commission and the United States. We have just been informed that the Interstate Commerce Commission and the United States acquiesced in and accepted this decision and proceeded to a redetermination of the case (22 I. C. C. R., 149). In this case we submit the Commerce Court laid down and applied rules in harmony with what we are contending for in the case at bar. During the course of his opinion *Judge Mack* said (at p. 592):

“The first and decisive ground of attack is that the order ‘is without the scope of the delegated authority under which it purports to have been made’ (*I. C. C. v. Ill. Centr. R. R. Co.*, 215 U. S., 452, 470, 30 Sup. Ct., 155, 54 L. Ed., 280), in this: that, while in form holding the \$1.15 rate unreasonable and prescribing the \$1 rate as reasonable, IN SUBSTANCE THE COMMISSION DID NOT DETERMINE THE INTRINSIC REASONABLENESS OF EITHER RATE, BUT REDUCED THE RATE PRESCRIBED BY THE RAILROADS IN ORDER THAT, AND TO A POINT AT WHICH, IN ITS JUDGMENT, THE CALIFORNIA GROWERS MIGHT SUCCESSFULLY COMPETE WITH THEIR SICILIAN COMPETITORS IN A BROADER MARKET THAN WOULD OTHERWISE BE POSSIBLE; IN OTHER WORDS THAT



THE COMMISSION ACTED UPON THE ERRONEOUS ASSUMPTION THAT IT HAD THE POWER AND RIGHT, IF NOT THE DUTY, TO SO ADJUST RAILROAD RATES AS WOULD GIVE TO THE AMERICAN INDUSTRY PROTECTION AGAINST FOREIGN COMPETITION."

And again (at p. 594) :

"(1) The authority granted it under Section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable DOES NOT CONFER ABSOLUTE OR ARBITRARY POWER TO ACT ON ANY CONSIDERATIONS WHICH THE COMMISSION MAY DEEM BEST FOR THE PUBLIC, THE SHIPPER AND THE CARRIER. *Its order must be based on TRANSPORTATION CONSIDERATIONS. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.*"

And again (at p. 596) :

"While the difference of less than 500 miles in the length of the average haul of lemons and

oranges is a fair transportation factor to be considered in prescribing blanket rates for both products, it is apparent from the report that this was but a small, if not an entirely insignificant, factor in this case, especially as the increase of 50 per cent. in the protective tariff on lemons was expected by all the parties to widen the market for the California lemon growers and thus to increase the average length of the lemon haul.

*"As in our judgment the order is based primarily on the assumed authority to protect the industry against foreign competition, it must be held void as beyond the powers delegated to the Commission."*

Respectfully,

FRANCIS B. JAMES,  
*Of Counsel.*

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Nos. 1002-3-4-5 First National Bank Bldg.,  
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Nos. 805-6-7-8 Westory Building,  
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*Solicitors.*

January 17, 1912.

JAN 11 1912

JAMES H. McKENNEY,  
CLERK.

IN THE

**Supreme Court of the United States**

JAMES J. HOOKER, ET AL., <i>Appel-</i>	}	October Term, 1911. No. 773.
<i>lants,</i>		
<i>vs.</i>		
MARTIN A. KNAPP, ET AL., <i>Ap-</i>		
<i>pellees.</i>		

THE EAGLE WHITE LEAD CO.,	}	October Term, 1911. No. 774.
ET AL., <i>Appellants,</i>		
<i>vs.</i>		
THE INTERSTATE COMMERCE COM-		
MISSION, ET AL., <i>Appellees.</i>		

**REPLY BRIEF ON BEHALF OF APPELLANTS IN  
REPLY TO SUPPLEMENTAL BRIEF ON JURIS-  
DICTION BY HON. WINFRED T. DENISON,  
HON. JESSE C. ADKINS AND HON. S. BLACK-  
BURN ESTERLINE, COUNSEL FOR THE UNI-  
TED STATES.**

[APPEAL FROM DECISION COMMERCE COURT (VOTE OF  
3 TO 2) SUSTAINING DEMURRER TO BILL OF COM-  
PLAINT, CASES 5 AND 6, CONSOLIDATED 188 FED. REP.,  
242 AND 256.]

FRANCIS B. JAMES,  
*Of Counsel.*

LITTLEFORD, JAMES, BALLARD, FROST & FOSTER,  
Nos. 1002-3-4-5 First National Bank Bldg.,  
Cincinnati, Ohio.  
Nos. 805-6-7-8 Westory Building,  
Washington, D. C.  
*Solicitors.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1911.

---

No. 773.

JAMES J. HOOKER, ET AL., *Appellants*,

*v.*

MARTIN A. KNAPP, ET AL., *Appellees*.

---

No. 774.

THE EAGLE WHITE LEAD COMPANY, ET AL.,  
*Appellants*,

*v.*

THE INTERSTATE COMMERCE COMMISSION, ET AL.,  
*Appellees*.

---

REPLY BRIEF TO SUPPLEMENTAL BRIEF  
ON JURISDICTION BY HON. WINFRED  
T. DENISON, HON. JESSE C. ADKINS  
AND HON. S. BLACKBURN ESTERLINE,  
COUNSEL FOR THE UNITED STATES.

---

On the morning of this January 11, 1912, we were  
handed a brief on the subject of jurisdiction by Hon.

Winfred T. Denison, Hon. Jesse C. Adkins and Hon. S. Blackburn Esterline, counsel for the United States. As this case will proceed to argument this date we will endeavor to get out a brief in reply thereto in time to be filed before the argument is over. We will proceed briefly as follows:

## I.

### THESE CASES DID NOT ORIGINATE IN COMMERCE COURT.

These cases did not originate in the Commerce Court, but like the case of *Peavey vs. Union Pacific R. R. Co.* (March 3, 1910), 176 Federal Reporter, 409, affirmed under the title *Interstate Commerce Commission vs. Diffenbaugh* (November 13, 1911), 222 U. S., 42, originated in the United States Circuit Court and under the provisions of the act creating the Commerce Court, were transferred to the Commerce Court.

## II.

### PARTIES COMPLAINANT AND JURISDICTION IN CASE NO. 773.

This was briefly discussed in our main brief, pages 53 to 54.

Attention is called to the statement of counsel for the C. N. O. & T. P. Ry. Co. that James J. Hooker and Ezra E. Williamson brought this action on behalf of themselves and all others similarly situated. On the contrary, they brought the bill of complaint in case No. 773 on behalf of the Receivers

and Shippers Association as appears in the Bill of Complaint, as follows:

“Your orators, James J. Hooker and Ezra E. Williamson, the above named complainants, present this their bill of complaint on behalf of themselves and all persons, firms, partnerships, corporations, and all mercantile, commercial, industrial and manufacturing associations, and Societies and members thereof, members of and representing the Receivers and Shippers Association hereinafter referred to and all persons, firms, partnerships and corporations whose interests are similar or substantially similar thereto.”

Particular attention is called to the similarity of this allegation to the allegations in the *Peavey Elevation Case*, given in our reply brief, p. 3; in fact the Bill of Complaint in Case No. 773 was copied from the Bill of Complaint in the *Peavey Elevation Case*. No similar objection is made to the Bill of Complaint in Case No. 774. On motion of complainants in Case No. 773, that action was consolidated by entry duly made with case No. 774; on motion of complainants in Case No. 774 that action was consolidated by entry duly made with case No. 773. It was a proper case for consolidation because the subject matter of each suit was identical; the order complained of identical; the remedy identical and the parties complainant in both cases were identical because the complainants in case No. 774 *as alleged in the bill of complaint in that case* were members of the Receivers and Shippers Association. The matter presented, therefore, is a true case of con-

solidation of two actions wherein the complainants were in common, the subject matter in common, the order complained of in common, and the relief in common. This Court in *Martinez vs. International Banking Corporation*, 220 U. S., 214 (at pp. 221-222), calls attention to the distinction between consolidated actions and cases which are merely tried together for convenience. The case at bar is a true case of consolidation. In the cases at bar motions to consolidate were immediately filed on the filing of Case No. 774 and the Commerce Court on the opening day of its session, February 15, 1911, made an order and entry distinctly consolidating Cases No. 773 and 774 and not merely an order for them to be tried together. The two cases became and are one.

If this case is to be considered from the point of view of the Act creating the Commerce Court that Act distinctively gives a standing to associations and individuals.

### III.

#### PARTIES COMPLAINANT AND JURISDICTION IN CASE NO. 774.

This was briefly discussed in our main brief, pages 54 to 58.

### IV.

#### A SHIPPER HAS EQUAL RIGHTS WITH A RAILROAD CORPORATION TO BRING A BILL IN EQUITY TO ANNUL AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

This was discussed in our reply brief, pages 1 to 16.



## V.

## REMEDY.

The remedy was discussed in our main brief, pages 190 to 192.

As there pointed out and as had been previously stated by this Court in *Southern Pacific Terminal Co. vs. Interstate Commerce Commission* (February 20, 1911), 219 U. S., 498, by Mr. Justice McKenna, page 515, that the order itself is subject to be litigated even after an order had expired.

## VI.

## ORDER ITSELF SUBJECT OF JURISDICTION.

The order itself is a subject of jurisdiction. It is no answer to assert the fallacy that if the order in the case at bar is annulled that this will automatically restore a "76 cent schedule" of rates to the damage of complainants. The "70 cent schedule" of rates on file will continue to stand, and if this Court should annul the order of the Commission there will be no restraint, it is true, on the carrier from filing a new schedule of rates, but in the meantime the "70 cent schedule" of rates will prevail as the duly filed, printed, posted and published schedule of rates. As the carriers never attacked the order of the Commission if the carriers should file a new schedule higher than the "70-cent schedule," same having been filed since June 18, 1910, the burden of proof will rest on the carrier to justify the increased rates and the Commission

will have power to suspend the rates pending further investigation.

The majority of the Commerce Court in the case at bar (188 Fed. Rep., 242), and sustained the jurisdiction and said (at p. 247):

“The order of the Commission itself does not fix a schedule of rates to be put in effect by the C. N. O. & T. P., but simply fixes a maximum rate beyond which the railroad may not go. The railroad, however, upon the making of this order established the schedule of rates as high as the order would permit, and therefore it may be truly said that the schedule of rates put into effect by the railway company is the schedule of rates made by the Commission or at least authorized by it. All that this Court could do if it found the maximum schedule fixed by the Commission violated the constitutional rights of shippers over the C. N. O. & T. P. would be to set aside the order; but as the rates prescribed thereby have already gone into effect, and this Court has no authority or power to establish rates or to order that any particular rate be put into effect, it necessarily results that the rates now in effect on the C. N. O. & T. P. would continue in effect unless changed by the carrier or the Commission. The carrier could change its rates if the order was set aside and even make them higher than they are now. The Commission could again investigate the matter and fix a new schedule of rates. So that it appears that all the shippers would gain in this litigation would be the vacation of the order, and if the Court held that the rates permitted were so high as to be violative in a constitutional sense of the rights of the shippers then no doubt the Com-

mission would not again establish such a high schedule of rates. But in any event if we should set aside the order on constitutional grounds the shippers would be obliged to go again to the Commission for relief. At first we were inclined to think that the result which would be obtained by a successful termination of this suit in behalf of the shippers would be so inconsequential as to render it unnecessary for this Court to take jurisdiction over the case, but upon further reflection it would seem that the shippers have the right to a judgment of this court as to whether or not the schedule of rates contained in the order complained of is so high as to be violative of the fifth amendment to the Constitution as to the difference between what the Commission found would be reasonable if they considered the C. N. O. & T. P. by itself and the maximum rates that were fixed. **THEN IF THE SHIPPERS AGAIN WENT BEFORE THE COMMISSION THEY WOULD HAVE THE BENEFIT OF THE JUDGMENT OF THIS COURT UPON THAT SUBJECT.** And in that view we proceed to consider the question as to whether the reasons given by the Commission for not reducing the schedule of rates for the classes mentioned to the sums which the Commission found would be reasonable if the C. N. O. & T. P. should be considered by itself are valid."

What a majority of the Commerce Court said as to declaring an order of the Commission void on constitutional grounds is equally applicable when a court declares an order void on other grounds such as those enumerated in our reply brief (pp. 29 and

53) and as said in *Southern Pacific Terminal Co. vs. Interstate Commerce Commission* (1911), 219 U. S., 498, by *Mr. Justice McKenna* (at page 515) and quoted in our main brief (pp. 191-192) and further in our reply brief (pages 16 to 18).

The order in the case at bar was not a purely negative order as asserted in the supplemental brief (at p. 2). It is further asserted in the supplemental brief (at p. 4) that a broad and not a narrow view should be taken of the words "any order." The premises assumed is in direct contradiction of and in antithesis to the deduction sought to be drawn. The argument would give words "any order" the very narrow meaning which it is contended they should not have.

This statute referred to should be construed distributively and each of the powers conferred distributed to the proper case. The language of the statute is disjunctive and not conjunctive and it is absurd to contend that each section of the statute should be applied to each order of the Commission under every set of circumstances and facts. The statute, as we clearly pointed out in our main brief, under the head of remedy, gave the Court power to declare null and void an order of the Commission and this statute has been clearly analyzed in our reply brief (reply brief, p. 20) and attention there was called to the language of the statute as follows:

- (1) To *set aside* any order;
- (2) To *annul* any order.

We have already pointed out in this brief, in reply to the suggestion made at page 8 of the supplemental brief, that to annul the order of the Commis-

sion would not reinstate the "76-cent schedule" of rates, which, to quote the language from the supplemental brief, "the Commission, as well as the Court and the petitioners would have agreed to be excessive."

## VII.

### IN CONCLUSION.

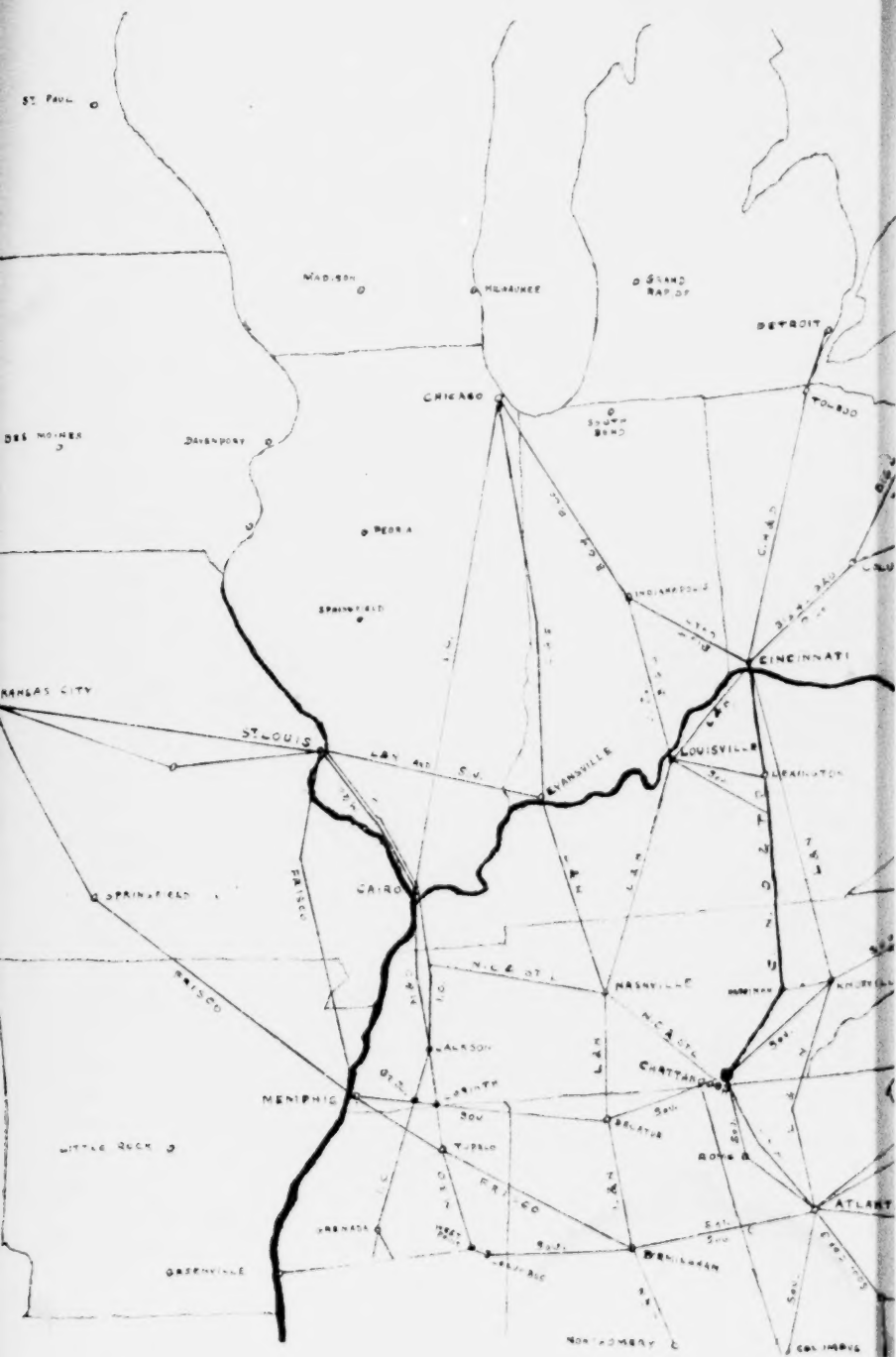
It is submitted that the Commerce Court had jurisdiction to entertain the Bills of Complaint and in assuming jurisdiction the action of the Commerce Court should be affirmed. It is further submitted, however, that a majority of the Commerce Court erred in sustaining demurrers and motions to dismiss the Bills of Complaint on their merits, and in this respect the Commerce Court should be reversed and this court on appeal in equity should overrule the demurrers and motions to dismiss on the merits and enter the order indicated in the dissenting opinion of *Judge Archbald*, concurred in by *Judge Mack* (188 Fed. Rep., 255), set out and quoted in our main brief (p. 194).

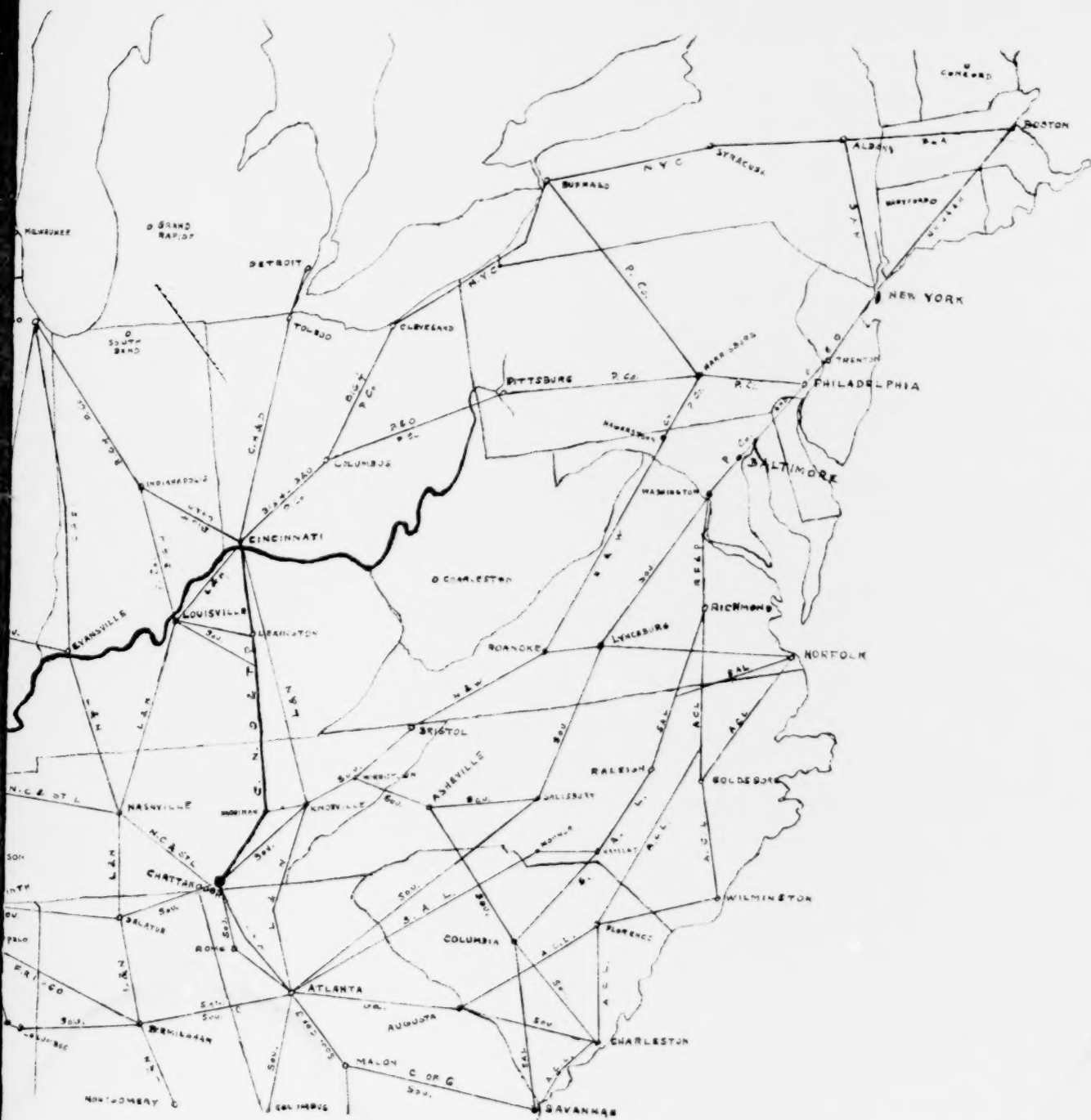
Respectfully,

FRANCIS B. JAMES,  
*Of Counsel.*

LITTLEFORD, JAMES, BALLARD, FROST & FOSTER.  
Nos. 1002-3-4-5 First National Bank Bldg.,  
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January 11, 1912.





IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

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**No. 773.**

JAMES J. HOOKER ET AL.

*vs.*

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---

**No. 774.**

THE EAGLE WHITE LEAD COMPANY  
ET AL.

*vs.*

THE INTERSTATE COMMERCE COMMIS-  
SION ET AL.

---

**BRIEF FOR THE CINCINNATI, NEW ORLEANS  
& TEXAS PACIFIC RAILWAY COMPANY.**

---

Final decrees dismissing the bills in these suits were rendered by the Commerce Court at its May session, 1911, and from these decrees the appeals are taken.



**The Issue Decided by the Commerce Court and the Error Alleged.**

The bills were filed in the Circuit Court of the United States for the Southern District of Ohio, Western Division, in No. 773 on July 14, 1910, and in No. 774 on October 24, 1910, and they are substantially identical, except that there are different parties complainant. They have reference to, and complain of, an order, or rather the rates which were prescribed by an order made by the Interstate Commerce Commission on February 17, 1910, upon a petition to that body by the Receivers' & Shippers' Association of Cincinnati, a voluntary organization, against the Cincinnati, New Orleans & Texas Pacific Railway Company and the Southern Railway Company.

There were demurrers to the bills in the circuit court and the suits, having been transferred to the Commerce Court, and having there been consolidated on motion of the complainants by an order of the 15th of February, 1911, were heard on bills and demurrers, and the motion to dismiss of the United States which had intervened, whereupon the final decrees now under review were rendered.

The bills voluminously set forth that the Cincinnati, New Orleans & Texas Pacific Railway Company operates a line of railroad between the city of Cincinnati, Ohio, and the city of Chattanooga, Tennessee; that the rates applied by the said company upon certain traffic moving from

Cincinnati to Chattanooga, namely, the traffic embraced in the numbered classes from 1 to 6, inclusive, were, prior to the order of the Commission, seventy-six cents per one hundred pounds, first class; sixty-five cents, second class; fifty-seven cents, third class; forty-seven cents, fourth class; forty cents, fifth class, and thirty cents, sixth class; that those rates were the subject of investigation by the Commission in 1894 (*Freight Bureau of the Cincinnati Chamber of Commerce vs. The Cincinnati, New Orleans & Texas Pacific Railway Co. et al.* and *The Chicago Freight Bureau vs. The Louisville, New Albany & Chicago Railway Company et al.*, 6 I. C. C. R., 195), when the Commission ordered a reduction of the seventy-six-cent scale to a sixty-cent basis, which order, however, in consequence of the decision of this court in the case of the Interstate Commerce Commission *vs. C., N. O. & T. P. Ry. Co.*, 167 U. S., 479, holding that the Commission had no authority to establish a rate for the future, was not executed; that, subsequently, in passing upon the petition of the Receivers' & Shippers' Association of Cincinnati, the Commission, by its order of February 17, 1910 (*Receivers' & Shippers' Association of Cinn. vs. C., N. O. & T. P. Ry. Co.*, 18 I. C. C. R., 440), directed a reduction of the rates to a seventy-cent basis, thus producing a rate of seventy cents, first class; sixty cents, second class; fifty-three cents, third class; forty-four cents, fourth class; thirty-eight cents, fifth class, and twenty-nine cents, sixth

class; that the Commission would have made a greater reduction had it considered the matters, and only the matters, which should have influenced its judgment; that it failed to do this and, as a result, those who are interested in the transportation of traffic from Cincinnati to Chattanooga are compelled to pay unreasonably high rates, and that, to the extent the rates approved by the Commission are unreasonable, the shippers are deprived of a right guaranteed them by the Fifth Amendment to the Constitution and by the Act to Regulate Commerce.

The allegation as to the supposed fundamental mistake of the Commission, whose order, together with its report, is exhibited with the bills, rests upon the circumstance that the Commission, in inquiring and determining what are reasonable rates to be charged by the Cincinnati, New Orleans & Texas Pacific Railway Company, took into view not only the financial status of that carrier, but the general adjustment of rates from other localities than Cincinnati to Chattanooga and other southeastern destinations, and the relation thereto, not only of the Cincinnati, New Orleans & Texas Pacific Railway Company, but of other carriers participating in the traffic, including the Southern Railway Company, which was an original party defendant, and the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, which had been allowed to intervene and become parties to the proceeding before

the Commission. The exact position taken by the Commission, as detailed in its report, will be stated further on.

The proposition presented by the bills is, as already indicated, that the rates prescribed by the Commission are unreasonably high, and thus invade the constitutional and statutory rights of shippers; that a lower maximum scale would have resulted from a proper investigation and consideration of the subject by the Commission, and, specifically, that the Commission misapplied the law in taking into account certain evidence which it is claimed was legally irrelevant and not accepting certain other evidence as conclusive of the issues presented for its decision. The prayer is for a decree operating on the Commission, or a decree operating on the carrier, or a decree operating on both, which will have the ultimate result of creating a lower maximum scale than that prescribed by the Commission.

The scope and theory of the bill as just outlined is confirmed by the plain statement in the brief of counsel for the complainants in the Commerce Court and repeated on page 71 of this brief in this court, where it is said:

“We cannot make it too clear in the beginning that we concede that both the common carrier and shipper are concluded by the finding of the Commission in the exercise of powers delegated to the Commission. We now adopt the argument used by the railroad companies in a recent case. The

Supreme Court of the United States in *Southern Pacific Company vs. Interstate Commerce Commission*, \* \* \*, as follows:

“ ‘In the argument at bar the railroad companies [*as in the case at bar, the shippers*—the words and italics by counsel for complainants] do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate adopted, that body has authority to examine the subject and if it finds the rate complained of is in and of itself unreasonable, having regard to the service rendered, to order a desisting from such rate and to fix in a new and reasonable rate to be operative for a period of two years. The companies further do not deny [*as in the case at bar the shippers do not deny*—the words and italics by counsel for complainants] that where the Commission exercises such authority, its finding is not subject to review by the court. *Interstate Commerce Commission vs. Illinois Central Railroad Co.*, 215 U. S., 452. In other words, the argument on behalf of the railroads [*as in the case at bar the argument on behalf of the shippers*—words and italics by counsel for complainants] fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute.’ ”

The extract quoted is from the *Willamette* case, 219 U. S., 433.

**There is No Error in the Decrees Against the Complainants on Their General Proposition.**

Passing the question of the jurisdiction of the Commerce Court, which will be noted later on, and assuming, for the sake of the argument, that the suits can be regarded as having been brought to set aside an order of the Commission, and therefore within the jurisdiction of the Commerce Court, it is desired to discuss now the general proposition relied on by the appellants which the Commerce Court, reviewing the action of the Commission, found untenable.

That it is untenable will appear when the order of the Commission is considered in the light of the principle announced by this court in such cases as

*Interstate Commerce Commission vs. Ill.*

*C. R. Co.*, 215 U. S., 452 (the ear distribution case);

*Southern Pacific Co. vs. Interstate Commerce Commission*, 219 U. S., 433 (the Willamette case, on which the complainants rely);

*Interstate Commerce Commission vs. D. L. & W. R. Co.*, 220 U. S., 235 (the forwarding case),

in which it is held, to use the language of the Chief Justice in the Willamette case:

“That an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute.”

It should not be forgotten that nothing which is alleged or argued in the present case with reference to the constitutional right of the shippers serves to make the proposition for which complainants are contending either more or less than that the Commission did not keep within the powers conferred by the statute, and that for that reason, and that reason only, its order should be pronounced invalid. The constitutional right, the denial of which is asserted, is the right to "due process of law." The decisions of this court leave no room for doubt that proceedings before the Commission constitute "due process of law," and hence that, after all, the question is whether in passing upon the petition of the Receivers' and Shippers' Association of Cincinnati the Commission exceeded its statutory powers. The view of this court is concisely stated as follows:

"That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. *Doe ex dem. Murray vs. Hoboken Land and Improv. Co.*, 18 How., 272, 280; *Bushnell vs. Leland*, 164 U. S., 684. As was said by Judge Cooley, in *Weimer vs. Bunbury*, 30 Mich., 201: 'There is nothing in these words (due process of law), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the Government is carried on and the order of society is

maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would not afford redress.' If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the Government. Even in the recent case of the *American School of Magnetic Healing vs. McAnnulty*, 187 U. S., 94; the constitutionality of the law authorizing seizures of this kind by the Postmaster General was assumed, if not actually decided, the only reservation being that the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority, or his action is palpably wrong. So, too, in the recent case of *Bates & G. Co. vs. Payne*, 194 U. S., 106, *ante*, p. 894, the law was also assumed to be constitutional, the only doubtful question being whether this court should accept the findings of the Postmaster General as to the classification of the mail matter as final under the circumstances of the case. Inasmuch as the action of the postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the Government in cases where the postmaster has exceeded his authority under the statute (*American School*



of *Magnetic Healing vs. McAnnulty*, 187 U. S., 94), we think it within the power of Congress to intrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases."

*Public Clearing House vs. Coyne*, 194 U. S., 509.

The petition to the Commission of the Receivers' & Shippers' Association of Cincinnati, and the answer thereto of the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway Company, which was adopted by the intervening carriers, put in issue *inter alia* the reasonableness of the class rates from Cincinnati to Chattanooga. It is not denied that there was such a hearing by the Commission as the act requires; that a mass of evidence was introduced and considered, and that such an order was made as the act contemplates. But it is claimed that the report of the Commission, which accompanied its order, shows that the Commission exceeded its powers. Therefore, it is primarily important to examine the report of the Commission for the purpose of ascertaining precisely what was its attitude and action.

The report was written by Commissioner Prouty, a Commissioner of unusual ability and experience, whose familiarity with the situation dealt with is exceptional. That part of the report relating to the reasonableness of the rates that were under attack, and of the rates ordered to be

substituted therefor, is confined to the last paragraph on page 75 of the record in No. 773, and the last paragraph of the report, on page 83 of the record, both inclusive.

The prosperous financial condition of the Cincinnati, New Orleans & Texas Pacific Railway Company, which is represented in the report but greatly exaggerated in the argumentative portions of the bills (see Brief in behalf of the Interstate Commerce Commission) had been urged on the Commission as the compelling reason for the reduction of the rates from the basis of a 76-cent scale to the basis of a 60-cent scale, and much of the part of the report just cited is a discussion of that matter. The opinion of the Commission as to the financial status of the company, as affording evidence relative to the reasonableness of the rates, is thus summarized:

“If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly thought reasonable by this Commission.”

In determining that such was not its duty, the Commission rejected the theory that freight rates should be measured by earnings as the sole standard, a theory which, as will be later shown, has no authoritative sanction.

The Commission, having thus refused to limit its view to the earnings of the Cincinnati, New Orleans & Texas Pacific Railway Company, and solely on that ground reduce the rates to a 60-cent scale, went on to determine what reduction should be made, and in doing this refused to limit its view to these local rates of the Cincinnati, New Orleans & Texas Pacific Railway, on traffic moving from Cincinnati to Chattanooga.

It said:

“Upon the face of the complaint, therefore, only rates to Chattanooga are involved, and those by only a single line of railway from Cincinnati to Chattanooga, but the complainants frankly admitted that they selected Chattanooga and the Cincinnati, New Orleans & Texas Pacific Railway Company because they believed that this made the strongest case for their contention, and that it was their hope and expectation that whatever was done at Chattanooga must be extended to other points in the Southeast.”

And so, while it is shown that the petition to the Commission was filed with the admitted design of obtaining a reduction of the rates of all carriers from everywhere, including all Ohio and Mississippi River crossings, to Chattanooga and the entire Southeast, it is nevertheless argued that the Commission was helpless, and the courts are now helpless, to go a step beyond considering the local rates of the Cincinnati, New Orleans & Texas Pa-

cific Railway Company from one of the river crossings to one of the southeastern destinations.

An extract from the report of the Commission will show better than is otherwise possible what would have been the result had the petitioners succeeded in their admitted design, and at the same time why the Commission believed that it could not properly escape taking into view the entire situation, and in this connection see the outline map herewith.

“The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Company, but also with reference to other companies whose rates are necessarily affected by these; otherwise stated the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company just as it would be the misfortune of some other company if it could not show as favorable earnings.

“The rate from Cincinnati and Louisville to Chattanooga has been the same for the last twenty-eight years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future. Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga

are lower by a fixed differential than from the Ohio River, and this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati.

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reduction to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates

from the North were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis & San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the North to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to

be adjusted upon a basis fairly satisfactory to that territory.

\* \* \* \* \*

"The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville & Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis, between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile. Now, in adjusting the rates of the Louisville & Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section of the road by itself, or shall it establish a common rate for the whole?

"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch-line business when it reaches the main line is surplus traffic from which a larger profit is made. It is in the

public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates upon the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907, over two-thirds of the tonnage was delivered to it by its connections, and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profit of today might not be a deficit.

\* \* \* \* \*

"If these rates are to be established with reference to other rates in the vicinity it becomes pertinent to inquire how the present rates compare with other rates for similar distances in the South. Extensive tables have been furnished by the defendants instituting such comparisons, and these tables have been to some extent criticised and replied to by the complainants.

"It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon



the numbered classes are lower than similar rates prescribed by the railroad commissions of most States in the South. They are as low and usually lower than the interstate rates made by Southern roads for similar distances.

\* \* \* \* \*

“We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive. In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established today. We do, however, think that some slight reduction should be made in these rates.”

18 I. C. C. R., pp. 462, 463, 465, 466, 467.

The case really calls for no argument, so clear and satisfactory is this statement of the considerations which guided the Commission.

The Commission, thus reiterating the admission made by the petitioners of their purpose to obtain a general reduction, found that a radical reduction of the local class rates of the Cincinnati, New Orleans & Texas Pacific Railway Company from Cincinnati to Chattanooga would involve a sweeping disturbance and depression of all freight rates from the East and from the West to practically the entire Southeastern territory, the rates from all the Ohio and Mississippi River crossings included, notwithstanding the rates were found to be in the main adjusted on a low level and with a fair

regard to the interests of all carriers and all communities, and that the rates of the Cincinnati, New Orleans & Texas Pacific Railway Company were not found to be excessive.

The Commerce Court, looking at the report of the Commission, which the appellants vouched in support of their contention, was of opinion and so decreed, that there could be no proper deduction from the terms of the report, that the Commission had exceeded its statutory powers.

The Commission certainly did not exceed those powers, unless it was wrong in holding that the earnings of a carrier are not to be used as the exclusive test and measure of the carrier's rates, or wrong in treating the question of the reasonableness of the system of rates of a carrier as one affecting the interests of many carriers and many localities. Was it wrong in either respect?

### **The Theory of Earnings as an Exclusive Test of Reasonableness.**

The theory, the hope of securing the approval of which perhaps inspired this litigation, is that the rates of a carrier should be made to depend exclusively upon its earnings, and when its earnings are found to be something more than ordinarily remunerative its rates should be reduced and that shippers can claim this as of right. For the reasons now to be stated, it is not believed that this theory can or ever will be approved.

(a) *It is practically impossible.*

Aside from the fact that the value of a carrier's property is often more difficult to determine than what is a reasonable rate, it is obvious that rates based strictly and solely on earnings would, in some cases, entitle carriers, in order to enable them to maintain their earnings, to rates higher than would otherwise be reasonable.

It is obvious that such rates would fluctuate from year to year or even shorter periods, thus preventing anything like that stability which is contemplated by the system of regulation, and imposing on the public higher rates when business is depressed than when business is active, and the highest rates at times when business is most inactive and the public least able to pay.

Furthermore, an authoritative declaration that rates shall be measured by the earnings of the carriers would have the effect of diminishing the value of railroad properties and discouraging the investment in new railroad enterprises, which is still necessary for the development of the country.

(b) *Such a standard was unknown at common law.*

The common law required carriers to charge reasonable rates and gave a right of action to shippers against carriers charging unreasonable rates, and there was no other law on the subject in

England or America until the enactment in both countries of statutes for the regulation of the rates and practices of carriers.

Such actions were frequently brought in both countries, and the trial was by a jury under the court's direction. There is no reported case, it is believed, in which a jury was instructed to consider the earnings of a carrier in finding its verdict, and certainly no case in which the jury was instructed to do what the appellants are proposing; namely, consider earnings to the exclusion of all else.

*(c) Such a standard is unknown in the construction and administration of the English statutes.*

The English statutory system of regulation was adopted long prior to 1887, and it has always embraced an express requirement that rates shall be reasonable, reiterating in that way the common-law principle. It has never specified any other standard. The requirement of the statute has been observed and enforced, so far as the matter of reasonableness is concerned, just as was the common-law principle.

The English cases in which the question of earnings of carriers has been considered are cases arising under statutory provisions, declaring rates in effect at a certain date to be reasonable, and directing as a condition of any advance being allowed

that a change of conditions be shown. In some of those cases the carriers have undertaken to show the change of conditions by showing a reduction of their earnings, and in that way there has been a consideration by the English tribunals of rates in relation to earnings.

Otherwise, the English tribunals, in passing on the reasonableness of rates, have not been controlled by the evidence of earnings. The leading case on this subject is *Canada Southern Railway Company vs. International Bridge Company, L. R., 8 App. Cas., 723*, decided in 1883, which concerned the reasonableness of the charges for the use of a bridge over the Niagara River. The Court of Appeals of the Province of Ontario, Canada, held that the rate of the bridge company was unreasonable, arriving at its conclusion by a consideration of the capital invested and the dividend paid. On appeal to the House of Lords every question as to capital and dividends was discarded and the decree, which reversed the Canada court, was based altogether on the fact that the rates, when examined with reference to the service rendered and the benefit received, were reasonable. Lord Chancellor Selborne said:

“It certainly appears to their lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say

that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made."

See also *Rickett, Smith & Co. vs. Midland Ry. Co.*, 9 Railway & Canal Traffic Cases, 107; *Black vs. Caledonia Railway Co.*, 11 Railway & Canal Traffic Cases, 176; *Smith & Forrest vs. Railway Co.*, 11 Railway & Canal Traffic Cases, 156.

The House of Lords, so far from being asked to adopt the proposition now urged by appellants, was simply asked to hold that evidence of earnings should be given serious consideration, and this it declined to do. It was not asked to hold, as is this court, that evidence of earnings shall be given exclusive consideration.

*(d) Such a standard is not provided by the Act to Regulate Commerce.*

The act forbids unreasonable rates and authorizes the Commission to ascertain, upon complaint of rates, whether or not they are unreasonable, and, finding them unreasonable, to substitute reasonable rates in their stead. When the act was being framed, Congress recognized that it was

giving statutory expression to the common-law principle. This is placed beyond doubt by the committee reports and debates, as well as by the language of the act. Congress, in thus legislating, of course, knew that the reasonableness of rates at common law never had been measured by earnings and that the reasonableness of rates under the English statutes then in force never had been thus measured, and the inevitable assumption is that it had no intention of providing any such standard as the appellants now propose.

In the proceedings in Congress in 1886 and 1887, preliminary to the passage of the act of 1887, it is safe to say that very little, if anything, will be found in what was done or said at that time to indicate that any such conception of rate-making as that now proposed by appellants ever occurred to those who were then building up our system of regulation. But if the contrary were true and if much could be found to create the idea that, in the mind of Congress, there was then some thought of the relation of rates to earnings, nevertheless the fact would remain that it found no expression in the act.

*(c) The Interstate Commerce Commission, construing the act, has never recognized such a standard.*

In no case decided by the Commission has it been declared, as now proposed by complainants, that the field of evidence on issues of reasonable-

ness should be limited to a consideration of the earnings of a carrier, when its earnings are shown to be unusually large. It is true that, in many cases, the Commission has discussed the earnings of carriers when passing on their rates, just as it did in the case which resulted in the order reducing the Cincinnati-Chattanooga rates. That case and the cases cited in that report may be taken as showing the construction which the Commission has placed upon the act, and which is entirely at variance with what is proposed by the appellants. In a very recent case the Commission, simply reiterating what it had stated substantially in previous cases, said:

“A railroad company may be operated with a less return than it ought to enjoy, or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for services performed, all things being considered. So also the fact that the net earnings of a carrier may be large does not of itself justify us in fixing a rate at less than is reasonable for the service, all other things being considered. While bearing in mind the generous returns received on the bridge investment by the Illinois Central, we must therefore also consider what else is disclosed upon the record.”

Board of Railroad Commissioners *vs.*  
I. C. R. R. Co. *et al.*, 20 I. C. C.  
R., 181.



(c) *This court, in construing the act, has never recognized such a standard.*

The court has never held that rates should be measured solely by earnings. It has not even held that earnings should be the controlling factor. The court has not had occasion to consider the matter of earnings, except in *Smyth vs. Ames*, 169 U. S., 466, and in a line of subsequent cases, the latest of any importance being *Knoxville vs. Knoxville Water Co.*, 212 U. S., 17, and *Wilcox vs. Consolidated Gas Co.*, 212 U. S., 384.

All the court has ever decided upon this subject is that ONE rule by which to determine whether rates fixed by legislative authority are so low as to deprive a railroad company of its property contrary to the Constitution, is that if under those rates the company would earn less than a fair return upon the fair value of its property, then those rates are unconstitutional because too low. That is as far as the court has gone. It has dealt solely with the question as to whether these rates were so low as to be unconstitutional.

In other words, when the court has considered earnings in relation to rates, it has not done so on a direct issue of reasonableness, just, as has heretofore been pointed out, the English tribunals, when they have considered earnings in relation to rates, have not done so on a direct issue of reasonableness. The issue determined by the court has had reference to the constitutional limitation, as

the issue determined in England has had reference to changed conditions.

It is clear that this court has never held that the Commission, which it recognizes as a body of experts dealing with subjects of enormous importance and properly having access to a wide field of evidence, is confined to the consideration of the earnings of the carrier in any case where it is endeavoring to ascertain what rates will be reasonable.

“ As we have said, the Commission is the tribunal that is entrusted with the execution of the interstate commerce laws and has been given very comprehensive powers in the investigation and determination of the proportion which the rates charged shall bear to the service rendered. \* \* \* ”

*I. C. C. vs. Chicago R. Co.*, 218 U. S., 86.

Incidentally it may be noted that little has been said by this court relative to earnings in the cases where the issue of reasonableness has been directly considered.

*Southern Ry. Co. vs. Tift*, 206 U. S., 42.

*Illinois Central R. Co. vs. I. C. C.*, 206 U. S., 441.

*I. C. C. vs. Chicago R. Co.*, 209 U. S., 108.

The argument has so far been addressed to the Commission's rejection of the theory of the earnings test. But this argument might be discarded without necessitating the conclusion that the Com-

mission exceeded the powers conferred upon it by the statute, since it found, in language now to be again quoted from the report, that there was ground for holding, on the strength of a claim made by appellants themselves, that the earnings of the Cincinnati, New Orleans & Texas Pacific Railway Company cannot be segregated in the manner now urged by appellants.

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907, over two-thirds of the tonnage was delivered to it by its connections, and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between those two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself it is by no means certain that the apparently undue profit of today might not be a deficit.

"The complainants urge that the Cincinnati Southern is really a part of the Southern Railway system. If it were so considered the gross earnings per mile of the entire system would be less than those of either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis."

Receivers' & Shippers' Association *vs.*  
C., N. O. & T. P. Ry. Co., 18 I. C.  
C. R., 465.

And see the report as hereinbefore quoted for the opinion of the Commission that, measured by the standards ordinarily employed, the rates then in effect could not be declared excessive. It is beyond question that the Commission was of opinion that only by the most rigid and unqualified application of an earnings' test could it reach a different conclusion and condemn the rates as to any large extent unreasonable.

It has been thought unnecessary to refer to the fact that only the local *class rates* of the Cincinnati, New Orleans & Texas Pacific Railway Company were attacked before the Commission, the very large body of its *commodity rates* not being attacked. It is difficult to understand how the exclusive earnings test, if permissible under any circumstances, can be applied in fixing one rate or a part of the rates of a carrier, and not its entire system of rates. Even if it is ever permissible to compel a carrier to reduce its rates because its earnings are too large it is not perceived how the test can be applied so as to effect a reduction of a part of the carrier's rates, since the rates embraced in that part may already be sufficiently low from every point of view. For further reference to this aspect of the case, see page 28 of the brief filed on behalf of the Interstate Commerce Commission, where it is shown how fallacious is the allegation that the annual net profits of the C., N. O. T. P. amount to 44 per cent on the value of the property. The fact is, as there shown, that on no basis can a

figure in excess of about 8 per cent be assumed. As to this, see also the Commission's report.

**The Theory that the Commission Should Have Confined its View to the Cincinnati-Chattanooga Rates of the Cincinnati, New Orleans & Texas Pacific Railway Company.**

As has been shown, the appellants contend that the Commission, when it found that the operations of the Cincinnati, New Orleans & Texas Pacific Railway Company were profitable, should forthwith and heedless of all other facts have prescribed rates measured by the earnings of that company—even the fact that a variety of considerations pointed out by the Commission tended to show that the rates then in effect were not excessive.

This includes the idea that when the Commission investigates and passes on rates applicable to traffic moving via the line of a single carrier between two designated points (while it can consider the rates of other carriers for the purpose of comparison) it is precluded from considering the condition and interests of other carriers operating between the same points, or of carriers operating between related points and transporting competitive traffic, the rates on which must necessarily conform to the rates of the first-mentioned carrier, and still other carriers whose rates through an extended territory will necessarily be affected by a reduction of the rates first referred to, and the in-

terests of particular communities and of the entire public.

This theory, if correct, must be enforced without any reservation whatever, and thus enforced it would serve to disorganize and throw into confusion the important business interests of the country, and bring about a condition little short of chaos.

No such theory is set forth in the Act to Regulate Commerce. Plainly, the leading purpose of the act, which is to prevent undue discrimination and all of the manifold evils resulting therefrom, would be substantially, if not technically, defeated by the construction sought to be placed upon it by the appellants in the way of imposing upon the Commission the limitation suggested.

There are many provisions in the act, some of which are mentioned below, and several of which were introduced by amendment, indicative of the intent of Congress that in its administration the Commission should not overlook any part of the field of commerce or the relation of any carrier thereto. By the 12th section, as amended, the Commission is authorized "to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted." By the 6th and 15th sections, as amended, the Commission is given far more extensive authority than it had in the beginning to establish through routes and joint

rates, which sections also provide for the publication of joint tariffs. By the first section, as amended, the duty is imposed upon every carrier “\* \* \* to establish through routes \* \* \* and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein \* \* \*.” Unless the letter as well as the spirit of the act is to be sacrificed, it was not possible for the Commission to pass upon the reasonableness of the local rates of the Cincinnati, New Orleans & Texas Pacific Railway Company, from Cincinnati to Chattanooga, without giving some attention to the joint rates in which that company participates with other carriers, and which, as the Commission found, would be cut by a sharp reduction of the local rates, and to the conditions, therefore, not only of the one carrier, but to those carriers operating in connection with it to Atlanta and other destinations in the Southeast, which latter carriers participate in similar joint rates with other lines reaching the rivers besides the Cincinnati, New Orleans & Texas Pacific Railway Company. The reduction of the interstate rates of a carrier affects the rates in which that carrier participates with other carriers. The amendment of the fourth section of the act in 1910 is confirmation of the rule expressed theretofore by the Commission, for thereby carriers are now forbidden “to charge any greater compensation as a through

route than the aggregate of the intermediate rates subject to the provisions of this act."

As to the significance of the fact that, as just shown, many provisions of the act unmistakably press upon the Commission the duty of exercising its powers with a broad view and in a broad spirit, see the dissenting opinion (the statements in which, so far as they touch upon the matters discussed in this brief, may be taken as beyond controversy) in *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290.

Furthermore, it should be observed that the act does not direct that the Commission shall exercise its powers only upon petition by a shipper against a carrier, but that it may institute investigations on its own motion, and thereupon make general orders and regulations which necessarily affect the rates and practices, and therefore the revenue, of large numbers of carriers, and which would be unjust unless based upon a consideration of the condition of all.

Not only is the theory contended for not expressed in the act, but it is believed to be inconsistent with the policy which dictated its original passage, and which, from the beginning, has had regard to the field of commerce as an entirety.

If the policy of the legislation is not as just assumed, it is inconceivable that Congress, when amending the act from time to time, should have failed to make some express declaration on the



subject, since from the very outset the Interstate Commerce Commission has been pursuing the course which it pursued and for which it is criticised by the appellants in the present case. Soon after the organization of the Commission in 1887, the Commission, with Judge Cooley as its chairman, in its first annual report, said:

“But there are reasons which make it necessary, in adjudicating a case of alleged excessive rates, to consider rates on other lines or at other points, even when the complaining party makes no argument or draws no conclusion from them. Questions of rates on one line or at one point cannot be considered by themselves exclusively; a change in them may affect the rates in a considerable part of the country. Rates from the interior to New York necessarily have close relation to rates from the same points to Philadelphia, Boston, and Baltimore; rates from the seaboard to Toledo must have a similar situation to those from the seaboard to Detroit and other towns whose business men compete with those of Toledo in a common territory. Just rates are always relative; the act itself provides for its being so when it forbids unjust discrimination between localities. This prohibition may sometimes give to competition an effect upon rates beyond what it would have if the competitive forces alone were considered.”

In 1888, in a case involving a complaint of the unreasonableness of rates, the Commission said:

“Another consideration is not to be overlooked: A reduction of the rate on the defendant’s road would necessarily occasion a reduction on the Dunkirk, Allegheny Valley & Pittsburgh Road and on other competing roads. A like reduction would also be required to divers points reached by other lines, to which the same rate is made as to Buffalo. Those carriers have not been heard, and injustice might be done to them. The rates in that territory are so related on the different roads that a change on one unsettles others. A change requires, therefore, consideration and caution, and should be based on adequate grounds.”

Rice, Robinson & Witherop *vs.* Western N. Y. & Pa. R. R. Co., 2 I. C. R., 298.

In 1889, in a similar case, the Commission said:

“The question, however, of relative injustice, like other questions arising under the act, must be viewed upon broader grounds than a mere balancing of one rate against another. The entire field likely to be affected by any proposed change must be kept in view, and if, upon the whole, more injustice and trouble are likely from making the change than from declining to make it, the Commission should hesitate to interfere. In other words, when a reduction is demanded which will apparently throw into confusion an adjustment of rates, over a large section of country, which are not claimed to be unreasonable of themselves, and in respect to which any modification upon one line will result in general

disturbance and friction among a large number of shippers and carriers of the same product \* \* \*."

*Rend vs. C. & N. W. Ry.*, 2 I. C. R., 313.

In 1902 the Commission said:

"The system of rate making common to nearly, if not all, the transcontinental railroads operating in the sparsely settled western country between the prairies and the sea, is of so long standing, having prevailed since the beginning of rail transportation to the present time, and is a policy so fixed, so nearly universal as to require in its modification the amendment of practically all tariffs in that great belt, the upsetting of the system of rates on every line and at every station—a proceeding so revolutionary as would introduce infinite confusion, and perhaps loss, if hastily accomplished—and involves so many roads not represented in this proceeding, so many localities and interests whose claims are entitled to consideration, and as yet unheard, that it is impossible in this connection to finally dispose of the conflicting interests without more extended investigation and consideration; and therefore the relief prayed for by complainant is for the present denied."

*Shippers Union of Phoenix vs. A., T. & S. F. R.*, 9 I. C. C. R., 250.

In 1903 the Commission said:

"The question now presents itself, must we go further and examine the financial showing of other lines in determining what

rate shall be applied by these lines? The transportation charge must be the same by all routes. Whatever rate is made on grain from Chicago to New York by the Vanderbilt System must determine the rate between that point and the Atlantic Seaboard by all routes. Since the fixing of a rate upon that system indirectly determines what that charge shall be upon all other roads, should we, by reason of this indirect effect, consider the condition of those roads?

"It might be manifestly unfair to select a single advantageous line and make that the standard. We have seen that grain can be transported under actual conditions by the Lake Shore and the New York Central Railroads from Chicago to New York at a cost less than that by most other routes. It would be hardly just to these other routes to compel the putting in of a rate upon that line which was reasonable with respect to it alone, and which had no reference to its competitors. Upon the other hand it would be equally unfair to the public if the most expensive line were made the standard."

*In re Proposed Advances in Freight Rates*, 9 I. C. C. R., 382-425.

The decisions of the Commission just quoted were prior to 1906 and were within the knowledge of Congress when the amendment of 1906 was enacted. Those decisions, and the following to the same effect, rendered in 1909, were known to Congress when the amendment of 1910 was enacted.

In a very important case, which attracted the attention of the country, the Commission said:

“There is a wide difference between a water system which supplies a single community and a railroad which is part of a commercial and industrial whole supplying many communities. The city of Spokane could not develop if served by the Great Northern Railway alone; nor can we look wholly to the interest of Spokane. The whole territory served by these defendant lines must be considered and the existence of all these railroads to that territory is absolutely essential. These railroads cannot exist unless rates are established which will yield a fair return upon their property. We must therefore, in fixing these rates, have regard not altogether to any one particular railroad, but to the whole situation, and must consider the effect of whatever order we make upon all these defendants. Such was the opinion formerly expressed by this Commission in *In re Proposed Advances in Freight Rates*, 9 I. C. C. Rep., 382, and to that opinion we adhere.”

City of Spokane *vs.* N. P. Ry. Co.,  
15 I. C. C. R., 393.

In a case of hardly less importance, the Commission said:

“In the Spokane case, 15 I. C. C. R., 376, we held that the reasonableness of a rate between two points served by two or more carriers could not be determined by consideration alone of that line which is shortest and most favorably situated as to opera-

tions, earnings, etc., but that the entire situation must be considered."

Kindel *vs.* N. Y., N. H. & H. R. R. Co. *et al.*, 15 I. C. C. R., 555.

Following the principle stated in the foregoing cases, the Commission said:

"The Commission is also bound to consider the relation that rates involved in any case bear to rates at other points and take into account the probable result to such other points from a change in that relation."

Board of Trade of Winston-Salem  
*vs.* N. & W. Ry. Co., 16 I. C. C. R.,  
18.

The force attaching to the fact that Congress knew and acquiesced in this exercise of its powers by the Commission cannot be ignored. A valuable rule of construction applicable to the decisions of the Interstate Commerce Commission is stated in the dissenting opinion of Mr. Justice White in the case of *United States vs. Trans-Missouri Freight Association*, where it is said:

"Whilst the excerpts from the reports of the Commission, heretofore made, serve to elucidate the text of the act, they also, I submit, constitute a contemporaneous construction of the provisions of the act made by the officers charged with its administration, which is entitled to very great weight. *Brown vs. United States*, 113 U. S., 571, and cases there cited.

“The rule sustained by these authorities receives additional sanction here, from the fact that the construction at the time made by the Commission was reported to Congress, and the act was subsequently amended by that body without any repudiation of such construction.”

166 U. S., 290-369-370.

Lastly, it would seem that the Commission, in deciding the issue of reasonableness touching the local rates of the Cincinnati, New Orleans & Texas Pacific Railway Company, would have disregarded the views of this court had it considered only those rates and the condition of that Company. Not only the propriety, but the necessity of a liberal, rather than a narrow, construction of the provisions of the act, was emphasized by this court in one of the leading cases:

“The scope or purpose of the act is, as declared in its title, to regulate commerce. It would therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the

country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation. \* \* \*

“As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition.

\* \* \* \* \*

“Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions and is therefore most likely to have been the construction intended by the law-making power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers,



and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act." \* \* \*

"The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations; that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

*Texas & Pacific R. Co. vs. I. C. C.*,  
162 U. S., 197.

In another case where the order of the Commission related to rates of many carriers serving a great territory, it is said:

"The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided."

*I. C. C. vs. Chicago Co.*, 218 U. S., 88.

In a case involving rates in the territory where the appellee operates, the court passed directly upon a question not altogether dissimilar to the one now being discussed:

"The Interstate Commerce Commission, in making an investigation of a complaint filed by soap manufacturers as to the freight rate for common soap promulgated in a classification adopted to govern it in official classification territory, had the power, in the public interest, unembarrassed by any supposed admissions contained in the complaint, to consider the whole subject, and the operation of the classification in the entire territory, and also how far its going into effect would be just and reasonable, would create preferences, or would engender discrimination."

*Syllabus, C., H. & D. Ry. Co. vs. I. C. C.*, 206 U. S., 141.

The Commission in the present cases was compelled to investigate and by its order deal with the entire transportation situation, to which its expert

knowledge and the evidence that had been offered related. It could not fail to understand that a radical reduction of the local Cincinnati-Chattanooga rates of the Cincinnati, New Orleans & Texas Pacific Railway Company would force a similar reduction of the rates on all traffic from the central and western sections of the country to practically all of the Southeast, and a corresponding reduction from the eastern section. How enormous is the tonnage to which those rates are applicable, how vitally interested are all the carriers participating in that traffic and in the rates applicable thereto, not one of whom, except the Cincinnati, New Orleans & Texas Pacific Railway Company and the Southern Railway Co., were impleaded by the petition, and none of whom except the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway became parties afterward, and how general the disruption of adjustments and the loss of revenue, would be the result of such an order as was sought by the Receivers' & Shippers' Association, the Commission could not fail to understand. Nor could it fail to understand how injuriously many communities might be affected by any such limited consideration and determination of the issue of reasonableness as is being contended for by the appellants.

It is believed that no satisfactory answer can be suggested to the reasoning of the Commerce Court, in justifying the action of the Commission and

sustaining the validity of its order, when construing the statute with reference to its evident policy, and measuring the powers of the Commission with respect to that policy it says in its opinion in these cases:

“It appears from the findings of the Commission that it has always refused in the consideration of the reasonableness of a rate or rates to consider only the particular carrier making the same by itself, but on the contrary has always considered the rates in a particular territory or the rates of other carriers to be affected by the change of the particular rate or rates in question; and we think it fair to say that so far as the Commission is concerned there has been a uniform policy, public policy, if you please, because the Commission represents the United States in so far as it acts within the scope of its delegated authority in the establishment of reasonable and just rates, to the effect that it will not fix rates or determine their reasonableness solely upon a consideration of the particular carrier whose rates are directly involved. We think this court may take judicial knowledge of the fact that the interstate rates prescribed for the transportation of freight by common carrier must necessarily be more or less interdependent, or at least be so related to each other that the rate-making power will not simply because it has the power fix a rate upon a single line of railroad which will necessarily disorganize established and reasonable rates on other railroads in the same territory. All rates established in accordance with law are presumed

to be just and reasonable. It is for this reason that the rates for the transportation of freight of other carriers in the same territory may be looked into as evidence of what should be a just and reasonable rate, providing conditions are similar. We cannot as a court not vested with the power to fix rates say, beyond question, that the elements which the Commission took into consideration in fixing the schedule complained of were improper for the Commission to consider, and therefore cannot conclude that the Commission based a schedule of rates upon improper grounds."

Should there be substituted for the conclusion thus set forth that stated in the dissenting opinion, the results would be most unfortunate if not disastrous. One of the results would be the survival of only the strongest and most favored carriers and a cessation of railway construction, to say nothing of the injury that would overtake numberless communities.

#### **The Commerce Court Was Without Jurisdiction.**

The question of jurisdiction of the Commerce Court was raised by the demurrers and the Government's motion to dismiss.

The order of the Commission, as already stated, was made on February 17, 1910. The effective date of the order was the 15th day of July, 1910. The bill in No. 773 was filed in the circuit court on the 14th day of July, 1910, to which there was

a demurrer by the Cincinnati, New Orleans & Texas Pacific Railway Co.

For the reasons now to be stated the bill was clearly bad on demurrer.

That suit was brought by James J. Hooker and Ezra E. Williamson "on behalf of themselves and all persons, firms, partnerships, corporations, and all mercantile, commercial, industrial, and manufacturing associations and societies and members thereof, members of and represented in the Receivers and Shippers' Association hereinafter referred to and all persons, firms, partnerships and corporations whose interests are similar or substantially similar thereto."

As the persons, firms, etc., on whose behalf the suit was brought are not named as complainants, Messrs. Hooker and Williamson had no authority to bring it and have no standing to maintain it, unless the authority is conferred by equity rule No. 48, which is as follows:

"Where the parties on either side are very numerous and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in a suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

The scope of the rule is stated in Daniel's Chancery Practice, pages 190 and 191:

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested in the subject ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.

"The strict application of this rule, in many cases, creates difficulties, which have induced the court to relax it; and, as we shall see, it has long been the established practice of the court to allow a plaintiff to sue on behalf of himself and of all the others of a numerous class *of which he is one*, and to make one of a numerous class (as the members of a joint-stock company) the only defendant, as representing the others, on the allegation that they are too numerous to be all made parties."

See also:

Calvert on Parties, p. 28 *et seq.*

Street's Fed. Eq. Practice, sec. 544.

Story's Eq. Pleadings, secs. 97 to 119, and especially 107 and 108.

Foster's Fed. Practice, secs. 46 to 49, inclusive.

Mitford's Eq. Pleading (Tyler's ed., 1892), pages 258, 261.

Obviously, the rule was not intended to and cannot be construed as meaning that parties complainant having no interest are entitled to represent parties, not named as complainants, having an interest.

So far as the question of equity practice is concerned, which is the question now being presented, the bill might have been filed by one shipper or more than one shipper or by all shippers interested in the class rates of the C., N. O. & T. P. Railway Company from Cincinnati to Chattanooga; but certainly not by two complainants, neither of whom is alleged to have any interest whatever in the rates or any interest whatever in the traffic.

Should it be contended that the objection was met by a consolidation of the two cases in the Commerce Court, the reply is that a case improperly brought cannot be consolidated with another case which may be properly brought.

"It has been said that a consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except so far as the evidence in one is, by order of the court, treated as evidence in both. The consolidation does not change the rules of equity pleading nor the rights of the parties, as those rights



must still turn on the pleadings, proofs and proceedings in their respective suits. The parties in one suit do not thereby become parties in the other, and the decree in one is not a decree in the other unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense."

Foster's Fed. Practice, 4th ed., sec. 371, and cases cited in the notes.

As the bill in No. 773 was plainly demurrable, the question of the jurisdiction of the Commerce Court must therefore be considered with reference to case No. 774.

The bill in No. 774 was not filed until the 24th day of October, 1910, which was more than three months subsequent to July 14, 1910, the effective date of the Commission's order. The order had been obeyed and the rates prescribed thereby, namely, the 70-cent schedule, put in force long before the bill was filed.

By the statute creating it, there was transferred to the Commerce Court only the jurisdiction then possessed by the circuit courts in four classes of cases. Confessedly, the present case is not within the jurisdiction of the Commerce Court, unless it is a case "brought to enjoin, set aside, annul or suspend, in whole or in part" an order of the Interstate Commerce Commission, and the inquiry now is whether it is a case of that description.

The proceeding before the Interstate Commerce Commission was instituted by a voluntary organi-

zation attacking as unreasonable the 76-cent scale of rates.

It was disposed of by an order requiring a reduction of the rates. The order was obeyed and executed by the publication of the lower rates which became effective and began to be charged on the traffic much in advance of the suit being entered in the circuit court.

The bill, while in form attacking the order, in substance attacks, as unreasonably high, rates that were lawfully in effect when the bill was filed, and that had become so in consequence of the carrier having complied with the order.

Whatever may be said of the right of a shipper who petitions the Commission for a reduction of rates, to attack by suit, before it is executed, the order which is obtained, whether upon the ground that a reduction is refused, or upon the ground that an insufficient reduction is made, it is difficult to understand how the Commerce Court can entertain a suit brought after an order is executed, upon the ground that the rates resulting from its execution are deemed unreasonably high. To hold that such a suit must be entertained as one falling within the description given in the statute, would mean what? That any member of the shipping public can resort to the court at any time, however remote, subsequent to the execution of an order of the Commission without regard to whether he was or was not a party to the proceeding before that body; without any regard to the fact that the interests of other shippers and carriers may have ad-

justed themselves to the rates prescribed by the Commission; and without any regard to any change in commercial or transportation conditions that may have occurred, and notwithstanding that the Commission is always open to shippers, since its orders are not judgments which are affected by the principle of estoppel.

To maintain the jurisdiction of the Commerce Court in such suits would not be in the line of upholding the method of regulating rates embraced in the statutes which design to provide an exclusive tribunal, but quite to the contrary. There would obviously be results inconsistent with and to an extent destructive of that design and at variance with what are understood to be the principles announced by this court in cases already cited and others that might be cited.

In order that the statutory method of regulation should be upheld, either the jurisdiction of the Commerce Court to entertain the suit should be denied, the motion to dismiss being sustained, or else the demurrer to the bill should be sustained, since that method would be as much imperilled by recognizing the jurisdiction of the circuit court as by recognizing the jurisdiction of the Commerce Court. This would not prevent the shippers from resorting to the Commission at all times.

It is respectfully submitted that the decrees should be affirmed.

R. WALTON MOORE,

*Counsel for the Cincinnati, New Orleans  
& Texas Pacific Railway Company.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

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JAMES J. HOOKER ET AL., APPELLANTS,	} In Equity, No. 773.
<i>v.</i> MARTIN A. KNAPP ET AL., APPELLEES.	

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THE EAGLE WHITE LEAD COMPANY	} In Equity, No. 774.
et al., appellants,	
<i>v.</i>	
INTERSTATE COMMERCE COMMISSION	
et al., appellees.	

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BRIEF FOR INTERSTATE COMMERCE COMMISSION.

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## STATEMENT.

These cases come here by appeals from final decrees of the Commerce Court, dismissing the petitions of the appellants.

The cases were instituted in the Circuit Court for the Southern District of Ohio, Western Division, and, in accordance with the provisions of the Commerce Court act of June 18, 1910, were trans-

ferred to the latter court, where they were consolidated and heard together. (Rec., *Hooker Case*, 102.)

The subject matter of complaint is an order, dated February 17, 1910, which was made and entered by the Interstate Commerce Commission in a proceeding then pending before it and numbered 1542 on the Commission's docket. The body of the order is:

1. This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present rates of defendant the Cincinnati, New Orleans & Texas Pacific Railway Co. (lessee of the Cincinnati Southern Railway) for the transportation of articles in the numbered classes of the southern classification from Cincinnati, Ohio, to Chattanooga, Tenn., are, to the extent that said rates exceed the rates named in paragraph 3 hereof, unjust and unreasonable:

2. *It is ordered*, That said defendant be, and it is hereby, notified and required to cease and desist, on or before the 15th day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting

its present rates for the transportation of articles in the numbered classes of the southern classification from Cincinnati, Ohio, to Chattanooga, Tenn.

3. *It is further ordered*, That said defendant be, and it is hereby, notified and required to establish, on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for the transportation of articles in the numbered classes of the southern classification from Cincinnati, Ohio, to Chattanooga, Tenn., which shall not exceed the following, in cents per 100 pounds, to wit:

Class-----	1	2	3	4	5	6
Rate-----	70	60	53	44	38	29

(*Rec., Hooker Case*, 107.)

The rates named in the order will be hereafter referred to as the 70-cent schedule.

Said proceeding was instituted before the Commission in April, 1908, by the Receivers & Shippers Association of Cincinnati against the Cincinnati, New Orleans & Texas Pacific Railway Co. (hereinafter called the C., N. O. & T. P.) and the Southern Railway Co. In the complaint in said proceeding it was alleged, among other things, that certain class rates published and filed by the C., N. O. & T. P., and applied to the transportation of freight articles from Cincinnati to Chattanooga, were unreasonable. The classes and rates referred to are:

Classes-----	1	2	3	4	5	6
Rates-----	76	65	57	47	40	30

The rates last above mentioned will be hereafter referred to as the 76-cent schedule.

The Louisville & Nashville Railroad Co. (hereinafter called the L. & N.) and the Nashville, Chattanooga & St. Louis Railway (hereinafter called the N., C. & St. L.) were allowed to and did intervene in said proceeding on behalf of the defendants, and several other parties, including the Indianapolis Freight Bureau, intervened on behalf of the complainant. (Rec., *Hooker Case*, 60.)

The issues involved were tried in connection with matters embraced in a complaint filed before the Commission by the Chicago Association of Commerce against the Pennsylvania Co. and other carriers, but this complaint was afterwards dismissed by the Commission and need not be further referred to by us.

After full investigation had, in accordance with the provisions of the act to regulate commerce, the Commission entered the above order and in connection therewith made a report which will be found in 18 I. C. C. Rep., pp 440 et seq.

The reasonableness of the 76-cent schedule of rates had been challenged previously before the Commission in proceedings numbered 322 and 323 on the Commission's docket, instituted by the Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau against the C., N. O. & T. P. and other carriers. In those proceedings the Commission found said rates unrea-

sonable to the extent they exceeded the following schedule, namely:

Classes-----	1	2	3	4	5	6
Rates-----	60	54	40	30	24	22

(*Rec., Hooker Case, 57-59.*)

This will be referred to hereafter as the 60-cent schedule.

In connection with the proceedings last above mentioned the Commission made a report and entered an order dated November 24, 1894, requiring the carriers involved to cease and desist from exacting rates greater than those named in the 60-cent schedule. The carriers refused to obey the order, whereupon the Commission instituted a suit in the Circuit Court for the Southern District of Ohio, Western Division, to compel obedience. From that court appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, and the latter, rejecting the order of the Commission, submitted to this court the following question:

Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth—all proceedings preceding said order being due and regular so far as procedure is concerned?

This court answered that question in the negative and declared the order to be unenforceable because the Commission was without authority to fix rates to be charged in the future by common carriers.



The proceedings numbered 322 and 323 are known as and commonly called the Maximum Rate case, and pertinent citations relating thereto are as follows:

6 I. C. C. Rep., 195.

76 Fed., 183.

167 U. S., 479.

The C., N. O. & T. P. operates under lease a line of railway extending from Cincinnati to Chattanooga, 336 miles, which is owned by the city of Cincinnati. The equipment of the railway, however, is owned by the C., N. O. & T. P., and, although the latter is a separate entity, and is operated as such, its capital stock is owned by the Southern Railway Co.

Another line, 450.9 miles in length, extending from Cincinnati to Chattanooga, is formed by a connection of the railways of the L. & N. and N., C. & St. L. The L. & N. portion of the through route leads from Cincinnati, through Louisville, to Nashville, a distance of 299.9 miles, and the N., C. & St. L. portion runs from the latter city to Chattanooga, a distance of 151 miles.

Aside from such differences as were made necessary by differences in the names of the parties, the allegations contained in the petitions herein are the same in substance, and for convenience we have made a summary of the allegations in the petition in the Hooker Case. Said summary, marked "Exhibit A," is attached to and made a part of this brief.

In substance the basis of the relief asked for by the petitioners is:

(1) That the rates named in the 76-cent schedule are excessive.

(2) That the rates named in the 70-cent schedule contained in the order are excessive.

(3) That the rates named in the 60-cent schedule are reasonable.

And the petitioners conclude that by its failure to substitute for the rates named in the 76-cent schedule rates less than those contained in the 70-cent schedule the Commission has deprived the petitioners of their property without due process of law and without just compensation.

In support of these allegations the petitioners make statements concerning the property, capitalization, receipts, disbursements, and profits of the C., N. O. & T. P., of the L. & N., and of the N., C. & St. L., and many other statements of a similar character, including the tonnage transported and the mileage operated by said carriers.

They aver that the Commission weighed improperly the evidence adduced, treated as material evidence matters which should not be so considered, and construed erroneously the law under which the Commission operates. In support of these averments they call attention to statements contained in the Commission's report, from which they make certain deductions.

The order entered by the Commission in the proceeding numbered 1542 has been obeyed by the C., N. O. & T. P. and is now in force.

Requests contained in the prayers of the petitions, so far as they pertain to the Commission, are, in substance:

(1) That the order of the Commission in proceeding numbered 1542 be suspended and set aside.

(2) That the Commission be enjoined from enforcing said order.

(3) That the Commission be required to reopen said proceeding and redetermine the issues therein involved, in accordance with the Constitution and laws of the United States as they may be construed by the court. (Rec., *Hooker Case*, 52-54.)

On July 20, 1911, and after the cases had been fully heard by the Commerce Court upon the petitions and upon demurrers thereto filed by the parties, that court rendered its opinion in the premises and entered orders dismissing the petitions, from which appeals were taken to this court as aforesaid. (Rec., *Hooker Case*, 106-117, 120; *Eagle White Lead Company Case*, 81.)

## POINTS.

### THE ORDER OF THE COMMISSION IS VALID AND SHOULD NOT BE SET ASIDE BY THE COURT.

The petitioners admit (petitions, paragraphs 29-30) that all proceedings before the Commission up to the time the order was made were regular and in accordance with the provisions of the act, and also admit, at least they do not deny, that the order was duly served upon the parties.

In form, therefore, the order is "within the scope of the delegated authority under which it purports to have been made," and the only question for determination is, Has the exertion of authority questioned "been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power?" (*Int. Com. Com. v. Illinois Central R. R. Co.*, 215 U. S., 452, 470.) This question was answered in the negative by the Commerce Court, and for the following reasons we think that answer is correct:

For the purpose of establishing such unreasonableness, the petitioners make allegations which they claim tend to show that the rates named in the

76-cent schedule are unreasonable; that the rates named in the 70-cent schedule are also unreasonable, and that the rates named in the 60-cent schedule are reasonable; but for that purpose we respectfully submit that such allegations are of no consequence whatever.

The order, as shown by the first paragraph thereof, is based upon the Commission's finding that the rates named in the 76-cent schedule are unreasonable, and there is nothing in the order which requires the C., N. O. & T. P. to exact rates as great as those named in the 70-cent schedule, or even as great as those named in the 60-cent schedule. The rates named in the order are not and could not be, under the authority conferred upon the Commission, absolute; they are only maxima. If the C., N. O. & T. P. should establish and put in force and apply to the transportation of freight articles from Cincinnati to Chattanooga, over the C., N. O. & T. P. Railway, rates as low as or lower than those embraced in the 60-cent schedule, it would not thereby violate in any manner, or to any extent, the order. Under these circumstances we are unable to perceive how it can be successfully contended that the order, although in form within the power conferred upon the Commission, is so unreasonable in fact that it should be regarded as beyond that power. To the extent that it operates at all it operates in favor of the petitioners and protects them against the exaction of rates greater than those named in the 70-cent schedule.

The petitioners show that the profits derived by the C., N. O. & T. P. from the operation of the C., N. O. & T. P. Railway are large, but they do not attempt to show that the profits they refer to are the result of business done under the rates named in the 70-cent schedule, and it is apparent that they may come entirely from other business; indeed, the petitioners' allegations concerning profits would not necessarily conflict with a claim that the rates named in the 70-cent schedule are unreasonably low. In connection with business done by the C., N. O. & T. P. over the C., N. O. & T. P. Railway, which is commonly called the Cincinnati Southern, the Commission in its report said:

This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907, over two-thirds of the tonnage was delivered to it by its connections, and most of it hauled as a through transaction from Cincinnati to Chattanooga, or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profit of to-day might not be a deficit. (See 18 I. C. C. Rep., 465.)

The petitioners also call attention to the fact that in 1894 the Commission found the rates named in the 76-cent schedule unreasonable to the extent they exceeded the rates named in the 60-cent schedule, and they claim this fact tends to show that the rates named in the 70-cent schedule are greater than they should be; but they fail to show that the pertinent circumstances and conditions which existed in 1894 were similar to those which prevailed in 1910, when the Commission fixed the maximum rates named in the 70-cent schedule. It is therefore apparent that no presumption attaches to the fact referred to, unless it be that a change in the pertinent circumstances and conditions took place between 1894 and 1910 which justified in the latter year the exaction of rates greater than those which would have been reasonable in the former year, and such a presumption, instead of operating in favor of the petitioners, would tend to show that their contention is unsound. In this connection the Commission said:

We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive. In this case, upon a view of the whole situation, we do not feel that the rates found to be reasonable in 1894 should be established to-day. We do, however, think that some slight reduction should be made in these rates to Chattanooga. Railroads operating south from the Ohio River are

among the most prosperous in this southern territory. In the readjustment of 1905 rates to Chattanooga from the Ohio River were not reduced, although those from the east were. (See 18 I. C. C. Rep., 466-467.)

The petitioners say further that the order is invalid because the Commission committed errors of law, and in support of this contention they call attention to some of the statements contained in the Commission's report, from which they make certain deductions. In other words, they say the order is invalid because the reasons given by the Commission in support of its conclusion are unsound.

The validity of the order does not depend upon the sufficiency or insufficiency of the reasons advanced by the Commission in support of its conclusion. The Commission may or may not have stated all the reasons which prompted it to form the conclusion it reported. It is not, by law, required to state any of its reasons; it is simply required to report its conclusions, together with its decision, order, or requirement in the premises. (See sec. 14 of said act.) The reasons of the Commission are not binding upon or subject to the control of the court. The court may think the reasons stated by the Commission are unsound and still be convinced that the Commission's order is valid. On the other hand, the court may be of the opinion that the reasons are sound, but, nevertheless, conclude that the order is invalid.



In *Interstate Commerce Commission v. Illinois Central Railroad Company*, *supra*, the Circuit Court had ruled that the order involved was invalid so far as it pertained to coal cars used for the carrier's own fuel supply, and stated the reasons upon which it based its conclusion. In support of their contention that the action of the Circuit Court was wrong counsel attempted to show that the reasons of the court were unsound, but in reply this court said:

\* \* \* the court below reasoned that the transportation of coal bought from a mine by the railroad company for its own use, after delivery to it in its coal cars at the tipple, was not commerce, because "commerce under these circumstances ends at the tipple," it yet reasoned that such coal was within the control of the interstate-commerce law to the extent that a regulation compelling its consideration, for the purpose of rating the capacity of a mine as a basis for fixing its *pro rata* share of cars in times of shortage, would be valid. Because of this reasoning, it is insisted, it appears that the court below but substituted a regulation which it deemed wise for one which it considered the Commission had inexpediently adopted, and this upon the assumption by the court that its authority was not limited to determining power. Without intimating an opinion as to the merits of the proposition, we put it aside as irrelevant, since we must decide whether the ac-

tion of the court below was correct, irrespective of the reasoning by which such action was induced. (Id. 470-471.)

Aside from their attack upon the reasons stated by the Commission in support of its conclusion it is somewhat difficult to ascertain from the petitions wherein the petitioners claim the Commission committed errors of law. They appear to have summed up in paragraph 68 of their petitions their objections to the Commission's report. In that paragraph they say in substance that the order of the Commission is null and void (1) because it is beyond the power of the Commission to make; (2) because it is contrary to law and in violation of the Constitution of the United States; (3) because it deprives complainants of their property without due process of law; (4) because it takes the private property of complainants without just compensation; (5) because the Commission evaded its duty to give substantial relief to complainants for its own convenience; (6) because the Commission acted upon conjectures; (7) because the Commission applied erroneous rules of law; (8) because the sound rules of law stated by the Commission were not applied by it; (9) because the Commission acted by mere fiat and arbitrarily; (10) because the Commission prescribed in lieu of the 76-cent schedule, which enabled the C., N. O. & T. P. to make net earnings of 44.43 per cent, the 70-cent schedule, which enables the C., N. O. & T. P.

to make net earnings of 44.18 per cent on the value of its property; (11) because in establishing the 70-cent schedule the Commission reduced the earnings of the C., N. O. & T. P. only \$12,000 a year or one-fourth of one per cent per annum on the value of its property; (12) because the Commission failed to find that the 70-cent schedule was just and reasonable.

It will be seen that their objections are, generally speaking, in the form of conclusions based upon the petitioners' views of what should be considered the pertinent and controlling facts, and we think they have been sufficiently answered in what we have already said.

However, they claim the Commission failed to find that the rates named in the 70-cent schedule were just and reasonable. We presume they mean by this that in connection with the rates named in the 70-cent schedule the Commission did not use the words "just" and "reasonable," but we are aware of no rule of law which requires the Commission to do so. As before stated, the Commission is not authorized to fix absolute rates; it can only prescribe reasonable maximum rates after finding that the rates complained of are unreasonable, and that is exactly what it did in this case. The pertinent language used by the Commission in its report was:

\* \* \* We are of the opinion that the present rates are unreasonable, and that rates should be established upon the num-

bered classes, not exceeding in cents per 100 pounds the following:

Class -----	1	2	3	4	5	6
Rate-----	70	60	53	44	38	29

and it will be so ordered. (*Hooker Case*, 83.)

And the corresponding language of the order is as follows:

\* \* \* having found that the present rates of defendant, the Cincinnati, New Orleans & Texas Pacific Railway Company (lessee of the Cincinnati Southern Railway), for the transportation of articles in the numbered classes of the southern classification from Cincinnati, Ohio, to Chattanooga, Tenn., are, to the extent that said rates exceed the rates named in paragraph 3 hereof, unjust and unreasonable. (Rec., *Hooker Case*, 107.)

The duty and authority of the Commission in the premises is contained in section 15 of said act, the pertinent portion of which reads as follows:

That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, \* \* \* the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property \* \* \* are unjust or unreasonable \* \* \* the Commission is hereby authorized and empowered to determine and

prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, \* \* \*

It will thus be seen that in this regard the Commission complied fully with the requirements of the law under which it operates and that the objections of the petitioners have no foundation in fact.

Also in paragraphs 31 and 32 of their petitions the petitioners show that the Commission did not base its decision entirely upon the cost to the C., N. O. & T. P. of the transportation services, and they claim that in neglecting to do so the Commission committed an error of law. We respectfully submit that exactly the opposite of this proposition is correct. If the Commission had considered only the cost of transportation it would, according to a ruling made in *Texas & Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S., 197, have failed to execute properly the duties imposed upon it by law. In that case, in connection with matters to be considered by the Commission when called upon to determine whether a rate complained of is lawful, the Supreme Court, speaking through Mr. Justice Shiras, said:

\* \* \* in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, \* \* \* is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation. \* \* \* (Id., 233.)

That matters other than cost of transportation apply to the situation is, we think, so obvious that an elaborate argument upon the point would be unjustifiable. In this case the petitioners say the Commission should have prescribed as maxima the rates named in the 60-cent schedule, but while that schedule names a rate of 60 cents per 100 pounds for the transportation of freight articles classified as first class it applies to articles classified as sixth class a rate of only 22 cents per 100 pounds, and common knowledge concerning the nature of traffic transported under class rates is sufficient to demonstrate that so great a difference could not be justified if cost of transportation only were considered. The cost of transporting a ton of wheat is probably not greater than the cost of transporting a ton of sand, nevertheless if it were necessary to make the rates equal the expense of transporting sand, over long distances, at least, would necessarily be so great as to prevent such transportation. These and many other illustrations of a similar nature which might be made show why the Commission is not, and should not be, confined to a consideration of the cost of transportation when called upon to determine whether or not rates complained of are unreasonable. Cost of transportation is, of course, an important element, but commercial, competitive, and other conditions must also be considered. This is made clear, not only by the language of this court above quoted, but also by other

language of the court in its opinion in the Texas & Pacific case *supra*, which is as follows:

\* \* \* we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; \* \* \* . We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic and the interest of the public that the carriers should secure that traffic rather than abandon it or not attempt to secure it. (Id., 218.)

**THE PRAYERS OF THE PETITIONS INDICATE THAT THE APPELLANTS ENTERTAIN AN ERRONEOUS VIEW CONCERNING THE NATURE OF THIS CASE AND THE JURISDICTION THEREIN OF THE COURTS.**

Having shown, as we believe, that the order is valid, further discussion appears to be unnecessary. However, we think the real complaint of the petitioners is, not that the Commission was without power to make the order, but that the relief granted to them was not as great as that to

which they consider themselves entitled. They appear to think that if, in the opinion of the court, the reductions in rates made by the Commission were not as great as they should have been, the court may set aside the order and require the Commission to make another order providing for greater reductions. But this view of the law is erroneous, since the jurisdiction of the court in a case like the one now under consideration does not include authority to issue writs of mandamus to officers of the United States.

*McIntyre v. Wood*, 7 Cranch, 504.

*M'Clung v. Silliman*, 6 Wheat., 598.

*Kendall v. United States*, 12 Pet., 524.

In the *McIntyre* case it was held that authority to issue writs of mandamus directed to officers of the United States is not possessed by the circuit courts in the several States, and in the *M'Clung* case a similar ruling was made concerning the jurisdiction of the State courts; but in the *Kendall* case it was decided that such jurisdiction was possessed by the Circuit Court of the District of Columbia, which is now the Supreme Court of the District.

In the latter case the Circuit Court of the District had issued a writ of mandamus commanding the Postmaster General to credit the accounts of the relators with certain sums of money which had been found to be due them, and the jurisdiction of the court to issue the writ was called in question upon appeal to this court. In passing upon that



contention, this court, speaking through Mr. Justice Thompson, said:

The next inquiry is whether the court below had jurisdiction of the case and power to issue the mandamus.

This objection rests upon the decision of this court in the cases of *M'Intyre v. Wood* (7 Cranch, 504), and *M'Clung* [*M'Clung*] *v. Silliman* (6 Wheat., 369 [598]). It is admitted that those cases have decided that the circuit courts of the United States, in the several States, have not authority to issue a mandamus against an officer of the United States. And unless the Circuit Court in the District of Columbia has larger powers in this respect, it had no authority to issue a mandamus in the present case. (*Id.*, 615).

The court then called attention to differences existing between the laws under which the Circuit Courts of the several States were organized, and the laws under which the Circuit Court of the District of Columbia was organized, and held, as above stated, that the jurisdiction of the latter includes authority to issue writs of mandamus to officers of the United States. (*Id.*, 616-626.)

It thus appears that at the time of the passage of the Commerce Court act the Circuit Courts of the United States did not have the mandamus power invoked by the appellants, and it necessarily follows that such jurisdiction is not possessed by the Commerce Court, since by section 1 of said act it is provided that in cases like those now under

consideration the jurisdiction of that court is the same as, and not greater than, the jurisdiction over like causes formerly possessed by the Circuit Courts.

But if the jurisdictional fact were otherwise, the petitioners would not be entitled to the order they request the court to make. They do not claim that the Commission failed to perform a ministerial duty imposed upon it by law, the performance of which did not require the exercise of judgment or discretion, and it is clear that, without the exercise of judgment and discretion, the Commission could neither have formed the conclusions it reported nor made the order which is the subject matter of this suit.

In *Commissioner of Patents v. Whiteley*, 4 Wall., 522, which was a proceeding to obtain a writ of mandamus requiring the Commissioner of Patents to examine an application for the reissue of a certain patent, this court, speaking through Mr. Justice Swayne, said:

The principles of law relating to the remedy by mandamus are well settled.

It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.

It lies also where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.

It is applicable only in these two classes of cases. It can not be made to perform the functions of a writ of error. (Id., 533-534.)

To the same effect see:

*West v. Hitchcock*, 19 App. D. C., 333, 342.

*Decatur v. Paulding*, 14 Pet., 497, 514, 516; 10 L. Ed., 559.

*U. S. v. Black*, 128 U. S., 40, 48; 9 Sup. Ct., 12; 32 L. Ed., 354.

*U. S. v. Guthrie*, 17 How., 284; 15 L. Ed. 102.

*Georgia v. Stanton*, 6 Wall., 50; 18 L. Ed., 721.

*U. S. v. Windom*, 137 U. S., 636, 644; 11 Sup. Ct., 197; 34 L. Ed., 811.

*U. S. v. Blaine*, 139 U. S., 306, 319; 11 Sup. Ct., 607; 35 L. Ed., 183.

*U. S. v. Lamont*, 155 U. S., 303, 308; 15 Sup. Ct., 97; 39 L. Ed., 160.

*Kimberlin v. Commission to Five Civilized Tribes et al.*, 104 Fed., 653, 655, 658.

It may be said that in each of the cases quoted from by us the relief asked for was a writ of mandamus, while in these cases the petitioners request the court to issue a writ of injunction, but in this regard the rules of law applicable to a writ of injunction are the same as those applied to a writ of mandamus.

In *Gaines v. Thompson*, 7 Wall., 347, the court, after citing several cases in support of the above rule, said:

It may, however, be suggested that the relief sought in all those cases was through

the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

In the one case the officer is required to abandon his right to exercise his personal judgment and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction. (Id., 356.)

**CONCLUSION.**

We think the record in this case shows clearly, not only that the appellants misconceive the facts and their bearing upon the matters under consideration, but also that they entertain an erroneous view concerning their rights under the Constitution of the United States.

By references to the petitions and the report and order of the Commission we have demonstrated, we believe, that all the Commission did, after performing properly in the premises every ministerial duty imposed upon it by law, was to exercise its judgment as to the reasonableness of the rates complained of and the maximum rates which should be established by the carriers and maintained for a period of two years from July 15, 1910. But although the function thus performed by the Commission is wholly legislative in character (*Prentiss v. Atlantic Coast Line Co.*, 211 U. S., 210, 226-227), the petitioners seem to think the judgment of the Commission is not binding upon them unless it happens to agree with the judgment of the court of last resort. They appear to believe that if, in the opinion of the court, the judgment of the Commission concerning reasonableness is erroneous, the court may set aside the order based upon that judgment and require the Commission to make another order based upon a different judgment. And in support of their conclusion that the judgment of the Commission is wrong they undertake to show

that under the maximum rates prescribed by the Commission the net profits of the C., N. O. & T. P. upon the value of its property will be 44.18 per cent per annum.

We have seen that the only rates here involved are a portion of those applied to the transportation of freight articles from Cincinnati to Chattanooga, but of course the revenues of the C., N. O. & T. P. include all rates, both passenger and freight, applied to the transportation to as well as from Cincinnati, and also all other transportation between points on the C., N. O. & T. P. Railway; and it is evident, too, that miscellaneous receipts of the C., N. O. & T. P., which are not derived from transportation services, might be a matter of some importance. It is therefore apparent that showing the entire net profits of the C., N. O. & T. P. to be large does not even tend to show that the rates named in the Commission's order are greater than they should be.

The impossibility of determining the reasonableness of the rates here involved by comparing them with the entire net profits of the C., N. O. & T. P. is made clear by statements contained in the Commission's report. In this connection the Commission said:

Of the entire traffic handled by the C., N. O. & T. P. in the year 1907, over two-thirds of the tonnage was delivered to it by its connections \* \* \*. The present large earnings may be due to the fact that the

Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railway but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profit of to-day might not be a deficit. (Rec., 81.)

But perhaps the most interesting thing connected with the contentions of the appellants is their claim that the net profits of the C., N. O. & T. P. upon the value of its property under the maximum rates prescribed by the Commission would be 44.18 per cent per annum. In arriving at this conclusion they place the value of the property used by the C., N. O. & T. P. for the benefit of the public at the sum of \$5,000,000 (Rec., 10). But in addition to this sum they show that during the years 1903 to 1908, inclusive, the C., N. O. & T. P. expended in permanent improvements \$13,412,637.79 (Rec., 9), and also show that before the property was leased to the C., N. O. & T. P. there was expended in its construction by the city of Cincinnati \$20,500,000 (Rec., 4), making an aggregate of \$38,912,637.79. They further show that the net profits of the C., N. O. & T. P. for the year 1908 were \$2,120,747.84 (Rec., 9), and if to this we add the rental paid that year to the city of Cincinnati by the C., N. O. & T. P.—\$1,050,000 (Rec., 4)—we have a total of \$3,170,747.84, and by dividing the latter aggregate sum by the former aggregate sum we find that

the net profits of the C., N. O. & T. P. were only a little more than 8 per cent. But that is not all. In this calculation nothing is allowed for depreciation, nor is any account made of the amounts which the appellants allege were expended by the C., N. O. & T. P. for permanent improvements during the years 1884 to 1902, inclusive.

However, the question of the reasonableness of the maximum rates prescribed by the Commission is not before the court for determination.

*Munn v. Illinois*, 94 U. S., 113, 144.

*Reagan v. Farmers Loan & Tr. Co.*, 154 U. S., 362, 397.

*St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S., 649, 665-667.

*Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S., 479, 499.

*San Diego Land & Town Co. v. Nat. City*, 174 U. S., 739, 753-754.

*Minneapolis & St. L. R. R. Co. v. Minnesota*, 186 U. S., 257, 269.

*San Diego Land & Town Co. v. Jasper*, 189 U. S., 439, 441-442, 446.

*Prentiss v. Atlantic Coast Line Co.*, 211 U. S., 210, 226-227.

*Knorville v. Knorville Water Co.*, 212 U. S., 1, 8.

*Interstate Commerce Commission v. Ill. Cen. R. R. Co.*, 215 U. S., 452.

*Baltimore & Ohio R. R. Co. v. United States, ex rel. Pitcairn Coal Co.*, 215 U. S., 481.



*Interstate Commerce Commission v. C., R. I. & P. Ry. Co.*, 218 U. S., 88.

*Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S., 433.

*Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S., 498.

*Interstate Commerce Commission v. D., L. & W. R. R. Co.*, 220 U. S., 235, 251-252, 255-256.

The only future rates to which the appellants are entitled are those established either by the carriers or by the legislative branch of the Government. The rights of the appellants under the Constitution of the United States do not include the right to have future rates established either directly or indirectly by the judicial branch of the Government. Prior to the passage of the act to regulate commerce the right of a court to pass upon the reasonableness of a rate of transportation was confined to rates which had been exacted from shippers in the past, and in this regard the passage of that act did not, as of course it could not, bring about any change. Under the provisions of the Constitution it would be impossible, by any law which the Congress could enact, to vary the line of demarcation between legislative functions on the one hand and judicial functions on the other, which has been clearly and definitely pointed out by this court in the case of *Pren-tis v. Atlantic Coast Line Co.*, *supra*.

For the reasons above given in detail we insist that the decree of the Commerce Court dismissing

the petitions of the appellants is correct and should be affirmed.

Respectfully submitted.

P. J. FARRELL,

*Solicitor for Interstate Commerce  
Commission, Appellee.*



**SUMMARY BY PARAGRAPHS OF ALLEGATIONS CONTAINED IN PETITION IN THE HOOKER CASE.**

1.

This suit is of a civil nature.  
Amount involved exceeds \$2,000.

2.

Description of complainants and parties for whom they act.

3.

Complainants manufacture, produce, and sell goods, wares, and merchandise to the extent of several hundred thousand dollars annually.

Manufacture and produce at Cincinnati and sell to purchasers located at Chattanooga.

Complainants have invested more than \$25,000,000 building up and maintaining their business.

4.

Description of defendant Interstate Commerce Commission.

5.

Description of defendant C., N. O. & T. P. Ry. Co.  
Description of C., N. O. & T. P. Ry.

6.

Complainants ship their freight articles from Cincinnati to Chattanooga over C., N. O. & T. P. Ry.

## 7.

C., N. O. & T. P. Ry. Co. published and filed rates for the transportation of said articles from Cincinnati to Chattanooga as follows:

Classes.....	1	2	3	4	5	6
Rates .....	76	65	57	47	40	30

## 8.

Said rates are extortionate, excessive, unjust, and unreasonable.

## 9.

On November 24, 1894, in cases numbered 322 and 323 the Commission found said rates unjust and unreasonable. On said date the Commission found that reasonable maximum rates would not exceed the following:

Classes.....	1	2	3	4	5	6
Rates .....	60	54	40	30	24	22

## 10.

During all times herein mentioned city of Cincinnati has owned said railway. The railway was opened for business in 1880. Original cost of the railway was \$18,000,000. The city subsequently expended for terminal facilities \$2,500,000.

## 11.

During times mentioned herein railway leased to C., N. O. & T. P. Ry. Co.

Rental prior to 1906 \$1,250,000 per year.

Rental 1906 to 1926 \$1,050,000 per year.

Rental somewhat greater for 40 years thereafter.

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12.

Said city pays  $3\frac{1}{2}$  per cent on money borrowed to construct railway and provide terminal facilities.

13.

C., N. O. & T. P. Ry. Co. owns equipment but has no property in railway except leasehold right.

14.

1903 to 1908 C., N. O. & T. P. capital \$3,000,000 common stock and \$2,000,000 preferred stock.

Thereafter preferred stock \$500,000 greater.

15.

1903 to 1908 value of property of C., N. O. & T. P. \$5,000,000.

Thereafter \$5,500,000.

16.

1884 to 1908 tons of freight hauled one mile and tons of freight hauled one mile per mile of road as shown in table.

17.

1884 to 1908 gross earnings, gross earnings per mile and receipts per ton per mile as shown in table.

18.

1884 to 1902 net earnings and net earnings per mile as shown in table.

19.

1884 to 1902 C., N. O. & T. P. improperly paid out of earnings sums whose amount is unknown to complainants for permanent improvements in rolling stock.

## 20.

1903 to 1908 C., N. O. & T. P. expended sums for permanent improvements and rolling stock as shown in table.

Prior to 1903 C., N. O. & T. P. capital \$3,000,000 common stock.

In 1903 C., N. O. & T. P. added \$2,000,000 preferred stock.

April 1, 1906, C., N. O. & T. P. borrowed \$1,500,000 and applied same to permanent improvements.

December 2, 1907, C., N. O. & T. P. borrowed \$500,000 and applied same to permanent improvements.

1903 to 1908 C., N. O. & T. P. paid \$683,000 of money borrowed.

\$3,317,000 of money borrowed is included in table pertaining to permanent improvements.

1903 to 1908 C., N. O. & T. P. expended \$1,023,789.79 for securities it now owns.

1903 to 1908 C., N. O. & T. P. expended out of earnings for said permanent improvements, rolling stock and securities \$11,119,427.58.

Complainants can not give accurately amount expended each year for said permanent improvements, rolling stock, and securities, but average so expended out of earnings was \$1,853,237.93.

## 21.

1903 to 1908 net earnings of C., N. O. & T. P. as shown in tables.

## 22.

1903 to 1908 net earnings of C., N. O. & T. P., after deducting rentals, interest and taxes, as shown in table.

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23.

1903 to 1908 net profits of C., N. O. & T. P. as shown in table.

Net profits based upon average shown in last subdivision of paragraph 20.

24.

1903 to 1908 net profit per mile as shown in table.

25.

1903 to 1908 average net profits per year, \$2,221,552.53.

26.

1903 to 1908 value of C., N. O. & T. P. property, \$5,000,000.

Net profit earned thereon in said 6 years, 266.58 per cent.

Yearly average of net profit, 44.43 per cent.

27.

If rates made by Commission November 24, 1894, applied, earnings would not be reduced more than \$188,651.30.

Net profits under Commission rates would have been \$2,032,871.23.

Net profits under Commission rates, 40.66 per cent.

27a.

Rates made by Commission on February 17, 1910, as follows:

Classes -----	1	2	3	4	5	6
Rates -----	70	60	53	44	38	29



If latter Commission rates applied from 1903 to 1908, yearly net profits would not be reduced more than \$12,000.

Average annual net profits under February 17 rates, \$2,209,552.53.

Percentage of profit under February 17 rates, 44.18 per cent.

## 28.

April 30, 1908, R. & S. Association filed complaint with Commission against C., N. O. & T. P., attacking rates named in paragraph 7, and asking for establishment of just and reasonable rates.

## 29.

Said complaint was duly investigated by the Commission.

In the proceeding before the Commission facts stated in paragraphs 5 to 27 of this bill were conceded.

## 30.

Receipt of evidence by Commission concluded in January, 1909.

Argument before Commission on May 10, 1909.

Commission made its report and order on May 24, 1910.

Said report and order were dated February 17, 1910.

Said report and order are "Exhibit A" of bill.

## 31.

Commission made findings of fact and conclusions as stated in this paragraph.

41

32.

Commission erred in not treating C., N. O. & T. P. Ry. by itself.

Commission should have ordered in 60-cent schedule.

33.

Commission ordered C., N. O. & T. P. to establish and put in force on or before July 15, 1910, rates as follows:

Classes-----	1	2	3	4	5	6
Rates-----	70	60	53	44	38	29

34.

Commission interpreted act to regulate commerce without regard to its terms and requirements and without regard to the Constitution and other laws.

35.

Payments made by complainants for such transportation are property and private property within the meaning of the Constitution.

36.

Commission found that if C., N. O. & T. P. were treated by itself 60-cent schedule of rates would be proper.

Failure of Commission to so treat said railway, and order of Commission making 70-cent schedule, deprived complainants of their property without due process of law to extent of difference between 60-cent schedule and 70-cent schedule.

By charging and collecting the 70-cent schedule C., N. O. & T. P. is taking private property of com-

plainants unlawfully and in violation of Constitution and without due process of law to extent of difference between 70-cent schedule and 60-cent schedule.

37.

For 70-cent schedule C., N. O. & T. P. earned in transportation services to complainants to amount only of 60-cent schedule.

38.

The L. & N. R. R. Co. and the N., C. & St. L. Ry. Co. were allowed to intervene and were heard in the proceeding before the Commission.

39.

At time of proceeding before Commission L. & N. operated miles of railway as shown in table and on Exhibit " B " to bill.

40.

At time of proceeding before Commission N., C. & St. L. operated miles of railway as shown in table and on Exhibit " B " to bill.

41.

C., N. O. & T. P. Ry. is shown on said Exhibit " B. " Distance from Cincinnati to Chattanooga over said railway is 336 miles.

42.

Distances over L. & N. are: From Cincinnati to Louisville 114 miles; from Louisville to Nashville 185.9 miles.

Distance over N., C. & St. L. from Nashville to Chattanooga is 151 miles.

In 1907 average gross earnings over L. & N.-N., C. & St. L. route was \$25,593.40 per mile.

## 43.

The Commission made findings concerning earnings, etc., of L. & N.-N., C. & St. L. route as stated in this paragraph.

## 44.

In 1907 gross earnings per mile of L. & N.-N., C. & St. L. line were \$25,593.40, while the gross earnings of C., N. O. & T. P. line were \$26,082.66.

## 45.

1903 to 1907 net income of L. & N. as shown in table.

Net income of L. & N. for 1908 not in record of proceeding before Commission.

1903 to 1907 capital stock representing balance of L. & N. property \$60,000,000.

1903 to 1907 net income percentages as shown in table.

Items for 1908 not shown in record of proceeding before Commission.

## 45a.

1903 to 1908 profit and loss account of L. & N. as shown in this paragraph.

## 45b.

In 1881 L. & N. declared stock dividend to stockholders of 100 per cent.

Result of operations of L. & N. for year ending June 30, 1910, as shown in this paragraph.

Surplus is equivalent of 16.7 per cent on \$60,000,000.

Complaint before Commission attacked reasonableness of schedule of rates but did not attack reasonableness of individual rate or specific rate on given article.

Complaint before Commission did not attack any rate or schedule of rates, or return on value of property of L. & N. Co., or of N., C. & St. L. Co., or of both companies.

Commission tried case as though called upon to adjust rates on entire lines of L. & N. and N., C. & St. L.

Language of Commission in this connection was as stated in this paragraph.

Commission ordered 70-cent schedule maintained for not less than two years from July 15, 1910.

Said 70-cent schedule would yield to C., N. O. & T. P. excessive net profit; namely, 44.18 per cent per annum on value of its property, and arbitrarily, oppressively, unconstitutionally, unlawfully, and by mere fiat deprive complainants of their property without due process of law, and deprive them of their private property without just compensation.

Commission ruled that in fixing reasonable rates for C., N. O. & T. P., interest of competing lines and

entire situation must be considered within proper limits.

If said ruling were applied within proper limits the L. & N.-N., C. & St. L. line from Cincinnati to Chattanooga would be treated as the equal of the C., N. O. & T. P. line between those points.

Commission, however, considered all lines of L. & N. and N., C. & St. L., and did not therefore apply said ruling within its proper limits.

## 49.

Instead of confining itself to the rates complained of, namely, those over C., N. O. & T. P. from Cincinnati to Chattanooga, Commission considered in addition many other rates, and in that connection made statements as shown in this paragraph.

A 70-cent schedule prescribed by the Commission would yield to the C., N. O. & T. P. an excessive net profit, namely 44.18 per cent per annum on the value of its property, and arbitrarily, oppressively, unconstitutionally, unlawfully, and by mere fiat deprive complainants of their property without due process of law and deprive complainants of their private property without just compensation.

## 50.

Complainants are entitled to reasonable rates from Cincinnati to Chattanooga over C., N. O. & T. P., and such rates should not be controlled arbitrarily or by mere fiat or by value of property of L. & N. and N., C. & St. L., and rates from Memphis to Chattanooga and Birmingham and from the east to Atlanta.

Commission has not shown why the C., N. O. & T. P. should not be considered by itself, or why complainants' property should be taken without due process of law, or why complainants' private property should be taken for public use without just compensation.

The Commission, in violation of modifications placed upon the exercise of its power, has required shippers, including complainants, to pay excessive rates from Cincinnati to Chattanooga over the C., N. O. & T. P. for the purpose of enabling another road to make profits, maintain branches, and diffuse population and industries.

Complainants requested the Commission to do two things: First, to ascertain whether the 76-cent schedule was reasonable; and, second, to substitute in place of the 76-cent schedule a schedule which would return to the C., N. O. & T. P. a reasonable profit upon the value of its property.

The rule of law is that a schedule of rates which yields excessive net profits is unjust, unreasonable, and, to the amount of the excess, takes property without due process of law and takes private property for public use without just compensation, and it is the duty of the Commission to apply said rule.

Another rule of law is that where the Commission finds unreasonable a schedule of rates complained of it must prescribe in lieu thereof another schedule which will yield a fair net profit to the railroad company.

The Commission is without power to prescribe a schedule of rates which will yield to the railroad company more than a reasonable net profit on the value of its property, and acts beyond the limitation of its powers when it does so, and in this regard the power of the Commission is not enlarged where the purpose of its action is to enable another road to make profits, maintain branches, and diffuse population and industries.

The Commission may consider rates other than those complained of where such rates apply to roads operated under circumstances and conditions similar to those pertaining to the road complained of, but such evidence should not be given controlling or decisive influence, and schedules pertaining to the former should not be applied to the latter for the purpose of enabling the former to make profits, maintain branches, or diffuse population and industries.

## 53.

The Commission did not apply said rules of law, but instead made rates for the C., N. O. & T. P. in such a manner as to enable the L. & N. and N., C. & St. L. to maintain branch lines and diffuse population and industries.

## 54.

The Commission acted in violation of the Constitution of the United States and beyond the powers delegated to it; considered as facts to be proved those which were merely evidentiary, and considered as evidence matters which were no evidence whatsoever, and arbitrarily and by mere



fiat refused to prescribe the 60-cent schedule of rates as appears in Exhibit "A" to this bill.

In support of its refusal the Commission said: "The rate from Cincinnati and Louisville to Chattanooga has been the same for the last 28 years, the distance is substantially the same and this relation in rates will undoubtedly be maintained in the future."

The C., N. O. & T. P. has no vested right in a particular schedule of rates and complainants should not be barred by lapse of time from having the 60-cent schedule substituted for the 76-cent schedule.

Shippers of Cincinnati have a right to their natural advantages and the Commission can not take away such advantages.

Cincinnati shippers' rights to rates from that point should not be interfered with by rights other shippers may have to rates from Louisville.

In further support of its action the Commission said: "Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by fixed differential than from Ohio River, and this relation will undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati."

Cincinnati shippers have a right to the natural advantages resulting from the location of the Cincinnati Southern Ry., and the Commission can not take away this right to relieve other roads at other Ohio River crossings of the necessity of making reductions in their rates in the absence of a showing that said other rates, if such reductions were made,

would not earn a fair return upon the value of their property.

Complainants and other Cincinnati shippers are entitled to the 60-cent schedule of rates over the C., N. O. & T. P. from Cincinnati to Chattanooga and should not be deprived of it (1) because the Commission finds no apparent reason why, if it adheres to its decision of said November 24 concerning rates from Cincinnati to Chattanooga, it ought not to do the same in the case of other localities in said territory, or (2) because the establishment of that schedule will render it necessary for the Commission to prescribe lower rates than those now in effect to other points in southern territory, or (3) because the Commission might be called upon to render justice to communities in the South other than Chattanooga, or (4) because of the conjecture of the Commission that there might be a corresponding reduction made in the rates from Memphis to Chattanooga and from Memphis to Birmingham, or (5) because the reduction of the rates from Cincinnati to Chattanooga might cause a reduction in rates from Cincinnati to Atlanta and from the east to Atlanta, or (6) because of the conjecture of the Commission that to make any considerable change in the rates from Cincinnati to Chattanooga will work a lowering in rates throughout the entire southern territory or produce a change in the relation of rates, or (7) because it might be inconvenient for the Commission to hear just complaints, or (8) because some other common carriers whose lines do not reach Cincinnati or Chattanooga might make a change in rates to correspond with the change made by the putting in force of the 60-cent schedule.

## 54a.

There was no evidence in case No. 1542 or facts within the cognizance of the Commission tending to show, nor did the Commission in its report find, that if such other reductions had been made the lower rates would have yielded to such other carriers less than reasonable return upon the value of their property.

## 54b.

The Commission found that "It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the railroad commissions of most States in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances." But these facts do not constitute sufficient reason for arbitrarily and by mere fiat depriving Cincinnati shippers of their property and just rights because the circumstances and conditions pertaining to the operation of the C., N. O. & T. P. are dissimilar from those pertaining to the operation of other roads in the South.

## 55.

The Commission arbitrarily and by mere fiat and beyond the limitation of its powers deprived complainants of their property and just rights upon the mere conjecture that the prosperity of the C., N. O. & T. P. might be due to the ability of the Southern Railway to turn traffic to the C., N. O. & T. P. and thus enable the latter to make profits it might not otherwise be able to secure.

and upon the mere conjecture that the case must be considered as though the C., N. O. & T. P. Ry. had been constructed with private capital.

## 56.

The Commission committed an error by considering the fact that Chattanooga was not complaining of unfair treatment as compared with other southern points.

## 57.

Cincinnati shippers are entitled to reasonable rates from Cincinnati to Chattanooga over the C., N. O. & T. P. regardless of what the Commission may think concerning action that may be taken by other roads in connection with other rates if changes in the rates from Cincinnati to Chattanooga are made.

## 58.

Cincinnati shippers are entitled to natural advantages which may result from the location of the C., N. O. & T. P., and in undertaking to deprive them of such advantages the Commission acted beyond its power.

## 59.

The Commission acted beyond its power in determining the rights of complainants upon its conjecture as to whether or not economies in connection with transportation will in the future offset advances in prices to the extent that they have in the past.

## 59a.

The Commission ruled that "A railroad is entitled to a fair return upon the value of the prop-

erty devoted by it to the public use, but it is not entitled to have that property paid for by the public." But instead of applying this rule, the Commission, by establishing the 70-cent schedule of rates, authorized and empowered the C., N. O. & T. P. to take from the public to pay for future additions as aforesaid annually, substantially and approximately \$1,670,606.30 and thereby acted beyond its power.

## 60.

By failing to consider the C., N. O. & T. P. by itself and establish the 60-cent schedule of rates the Commission acted beyond its power.

## 61.

In establishing the 70-cent schedule of rates the Commission was guided by erroneous rules of law and acted beyond its power in establishing the 70-cent schedule of rates without finding that such schedule would be reasonable.

## 62.

The Commission did not find that the 70-cent schedule of rates was a just schedule of rates or a reasonable schedule of rates or a just and reasonable schedule of rates.

## 63.

The effect of the Commission's action is a violation of section 5 of the act to regulate commerce and therefore such action is beyond the power of the Commission.

53

64.

The facts set forth and the rulings of law stated in the concurring opinion of Commissioner Clements are correct and by neglecting to act in accordance therewith the Commission deprived complainants of their property and just rights and the relief and remedy to which they are entitled. In his concurring opinion Commissioner Clements made statements as shown in this paragraph.

65.

Exhibit "C" to the bill is groupings by the Commission of railroads of the United States.

66.

The facts alleged in this bill are all the material facts showing that said 76-cent schedule was unjust and unreasonable.

The facts alleged in this bill are all material facts showing that said 60-cent schedule would be just and reasonable.

There were no other material facts before the Commission in said case No. 1542.

There were no other material facts within the cognizance of the Commission in said case.

67.

On July 15, 1910, the C., N. O. & T. P., pursuant to the order of the Commission, published and filed the 70-cent schedule and threatens to continue it in force for at least two years from said July 15.

68.

The order in case No. 1542 is null and void (1) because it is beyond the power of the Commission to make; (2) because it is contrary to law and in

violation of the Constitution of the United States; (3) because it deprives complainants of their property without due process of law; (4) because it takes the private property of complainants without just compensation; (5) because the Commission evaded its duty to give substantial relief to complainants for its own convenience; (6) because the Commission acted upon conjectures; (7) because the Commission applied erroneous rules of law; (8) because the sound rules of law stated by the Commission were not applied by it; (9) because the Commission acted by mere fiat and arbitrarily; (10) because the Commission prescribed in lieu of the 76-cent schedule, which enabled the C., N. O. & T. P. to make net earnings of 44.43 per cent, the 70-cent schedule, which enables the C., N. O. & T. P. to make net earnings of 44.18 per cent on the value of its property; (11) because in establishing the 70-cent schedule the Commission reduced the earnings of the C., N. O. & T. P. only \$12,000 a year or one-fourth of 1 per cent per annum on the value of its property; (12) because the Commission failed to find that the 70-cent schedule was just and reasonable.

## 69.

The complainants will be irreparably injured and suffer irreparable loss and damage.

## 70.

The Commission will maintain the order as an effective order unless it is suspended by this honorable court.

# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

---

JAMES J. HOOKER ET AL., APPELLANTS,	}	773.
<i>v.</i>		
MARTIN A. KNAPP ET AL., APPELLEES.		

THE EAGLE WHITE LEAD COMPANY ET AL.,	}	774.
APPELLANTS,		
<i>v.</i>		
INTERSTATE COMMERCE COMMISSION ET AL.,		
APPELLEES.		

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*ON APPEAL FROM THE COMMERCE COURT.*

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## SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF THE JURISDICTION OF THE COMMERCE COURT.

The petitioners, Hooker et al., originally applied to the Interstate Commerce Commission for reduction of the maximum rates between Cincinnati and Chattanooga from the 76 c. schedule to a 60 c. schedule.

The commission refused to make the full extent of this reduction, but did reduce to a 70 c. schedule.



Thereupon Hooker et al. brought this bill, demanding (R., p. 53) that the commission's order be "suspended, set aside, annulled, and declared void and of no effect" and that the individual defendants and the commission be required by mandatory injunction to set aside and annul the said order, to reopen the case, and to give the complainants further relief.

On motion, the United States was granted leave to intervene (R., p. 102).

The individual defendants, the commission, and the Railroad Company all demurred to the bill on the merits (R., pp. 97, 99), and the United States moved to dismiss on the merits and on the ground that the court had no jurisdiction (R., pp. 103-4).

The court took jurisdiction, but dismissed on the merits.

Another brief has been filed by the Government in support of the result.

In this brief we suggest that the Commerce Court had no jurisdiction over the case because it has no jurisdiction to set aside negative refusals of the commission to grant relief.

#### ARGUMENT.

**The Commerce Court has no jurisdiction to entertain petitions to annul purely negative orders of the commission.**

The classes of jurisdiction awarded to the Commerce Court by the act which created it (act of June 18, 1910, 36 Stat. L., 539, 1149) are the fol-

lowing, in all of which only the jurisdiction then possessed by the circuit courts was awarded:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a Circuit Court of the United States.

[That is, proceedings to enjoin departures *by carriers* from published rates or to enjoin discriminations *by carriers*.]

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a Circuit Court of the United States.

[That is, mandamus *against carriers* to compel them to file annual reports, etc., ordered by the commission and to move traffic and to furnish cars, etc.]

The first, third, and fourth classes here described are all plainly inapplicable.

The jurisdiction asserted can be maintained only under the second class which is "cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

In a narrow, literal view these words "any order" might be construed to apply even to negative orders such as those denying relief or dismissing complaints, but the context and the spirit and purpose of the act show that such could not have been the intention.

The first specified class of cases is for the "enforcement" of orders of the commission; that is, where the party directed to take action fails or refuses to take it and compulsion is desired against him.

The second class is plainly intended to cover the correlative cases—those brought for the "*non-enforcement*" of such orders; that is, where the party commanded to take action desires to be relieved, by legal process, from the compulsion. He has met an obstacle to his freedom, and he applies to have it removed. Here the word "annul" is used artistically, with its true meaning, viz, that an unlawful order of the commission may be swept away. There is no sense in "annulling" a negative.

The third class is cases for enforcing the operation of orders fixing rates.

And the fourth class is mandamus to compel carriers to obey the commission in respect of making reports, and to compel carriers to furnish cars and to move traffic, etc.

Thus, all four of these classes embracing orders have to do only with active orders, because it is only active orders which require to be either enforced if valid, or eliminated if invalid.

The context shows this purpose plainly.

Section 2 provides the right of appeal to the Supreme Court from interlocutory injunctions granted by the Commerce Court and describes such interlocutory injunctions as "restraining the *enforcement* of an order of the Interstate Commerce Commission."

Section 3 provides that the pendency of the suit to "enjoin, set aside, annul, or suspend any order" of the commission shall not of itself stay "*the operation*" of the order, but the Commerce Court may "*restrain or suspend, in whole or in part, the operation* of the commission's order." It also refers to a showing of irreparable damage from such operation as a basis for the temporary injunction. How can the "operation" of an order dismissing a bill be restrained? And if it can, how can

any "irreparable injury" flowing from such operation be alleviated by any temporary injunction?

Section 13 of the act amends section 16 of the original act to regulate commerce so as to make it fit in with the situation resulting from the establishment of the Commerce Court. It provides that the Circuit Court shall continue its jurisdiction over the enforcement of orders for the payment of money damages. (This, we assume, because it has a jury.) It then proceeds to define the jurisdiction of the Commerce Court, as follows:

*If any carrier fails or neglects to obey any order of the commission other than for the payment of money while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.*

Thus, again, the act defines the orders of the commission to which it refers as the active orders which the party fails or neglects to obey, or claims

his right not to obey, and this while using the same general words "any order" which appear in the principal clause.

Finally, there is no process authorized which is appropriate to any relief against a nonactive order. The court is not an appellate court which receives a record from a tribunal below, and having reached its conclusion on the point of law remands the record with instructions to proceed in accordance with the opinion. On the contrary, the Commerce Court is a court of original jurisdiction. The suit instituted before it is an entirely new and distinct proceeding. There is no line along which a mandate from the Commerce Court to the commission is to move. The commission is not even a necessary party.

These omissions are appropriate to the theory of jurisdiction which we have stated, because if the function of the Commerce Court is to deal with only operative, positive orders of the commission, then the mere annulling thereof disposes of the situation, and itself constitutes the relief without further process.

But if the Commerce Court has the jurisdiction claimed over purely negative orders, there is a grave omission in the act: This is illustrated by the present case. If the Commerce Court had concluded, as urged by the petition, that the 76 c.

schedule was excessive and that a 60 c. schedule was proper, it could have done nothing to accomplish any appropriate result. It could only announce its opinion. Essentially the case would be moot. If it had taken that view and entered an order annulling and setting aside the order of the commission, the sole direct effect would have been the opposite of its desire; because by wiping out the order of reduction to 70 c. it would have accomplished nothing but the reinstatement of the former rate of 76 c., which the commission, as well as the court and the petitioners, would have agreed to be excessive. In other words, it would have increased the error it was criticizing.

It seems hardly reasonable to suppose that Congress, if it has intended to give the Commerce Court this jurisdiction, would thus have left the court without any means of bringing itself to bear, and made its judgment mere *brutum fulmen*.

**The judgment should be reversed and the cause remanded to the Commerce Court with instructions to dismiss the petition for want of jurisdiction.**

January , 1912.

Very respectfully,

WINFRED T. DENISON,  
*Assistant Attorney General.*

JESSE C. ADKINS,

BLACKBURN ESTERLINE,

*Special Assistants to the Attorney General.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

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JAMES J. HOOKER ET AL., APPELLANTS,	}	No. 773.
v.		
MARTIN A. KNAPP ET AL., APPELLEES.		

---

THE EAGLE WHITE LEAD COMPANY ET	}	No. 774.
al., appellants,		
v.		
INTERSTATE COMMERCE COMMISSION ET		
al., appellees.		

---

ON APPEAL FROM THE COMMERCE COURT.

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT.

These cases come here on appeal from final decrees of the Commerce Court dismissing the petitions of the appellants.

The petitioners originally applied to the Interstate Commerce Commission to fix the maximum rates on traffic from Cincinnati to Chattanooga at a schedule known in this litigation as the 60 c. schedule, instead of the schedule known as the 76 c. schedule then in force.

The commission reduced the maximum rates from the 76 c. schedule down to a 70 c. schedule, but refused the further reduction.

It is this order of the commission which the petition seeks to set aside.

The Commerce Court refused the relief, dismissed the bill, and the petitioners appealed to this court.

In our view the only material claim raised is that the commission erred in refusing to determine the reasonableness of the rate between Cincinnati and Chattanooga, with exclusive reference to the cost of transportation on the shorter of the two existing routes between those two points.

The shorter route was 336 miles, over the C., N. O. & T. P.

The other route was 450.9 miles, over the L. & N. and the N., C. & St. L.

#### ARGUMENT.

##### I.

**No principle of law required the commission to determine the reasonableness of rates exclusively with reference to the cost of transportation by the shorter route. On the contrary, this court has held that it is the duty of the commission not to exclude other things from its consideration.**

The theory of the petitioners appears to be that the commission erred, as a matter of law, in not treating one sole fact as absolutely decisive (regardless of all other facts) on the question of reason-

ableness of the rate, the alleged exclusive and controlling fact being the cost of service via the shorter route.

This court has never countenanced so narrow a view of the functions of the commission. On the contrary, it has set aside action of the commission for failure to keep "in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country." *Tex. & Pac. Ry. v. I. C. C.*, 162 U. S. 197, 199. Similarly in *I. C. C. v. C. R. I. & P. Ry.*, 218 U. S. 103, this court held that—

The outlook of the commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country.

In this particular case the commission had to consider not only the supposed interests of the individual petitioner shippers, but the interests of Cincinnati, of Chattanooga, of the intervening points, the relation of through rates, the rates on other lines in similar conditions, the growth and commercial needs of the country served, the value of the transportation to the shippers (which includes the possibility of their reaching the market at a profit), the commercial conditions, the effect on the communications of Cincinnati, Chattanooga, and intervening points with the West, and with the East, and many other details of fact and policy.

The claim of the petitioners seems to come to the assertion that as a matter of law none of these things should be considered, but that the cost of service over the shortest mileage should be the exclusive fact on which the reasonableness of rates should be determined. That theory has long since been exploded, if it ever had any real vogue.

The court below very properly held, citing the *Tex. & Pac. Ry.* case, *supra*, that it was not vested with the power to fix rates and that the elements which the commission took into consideration in fixing the schedule complained of were not elements which that court could say were improper for the commission to consider, and that there was no ground for the court to hold that the commission based the schedule upon improper grounds. (R., p. 116.)

## II.

**This question whether the commission, in determining the reasonableness of rates, shall adopt the policy of limiting its cognizance to the bee line, is a legislative and not a legal question. The long continued practice of the commission on the point has been left undisturbed by Congress and should not now be disturbed by the court.**

This single short line from Cincinnati to Chattanooga was built in 1880.

Long prior to that time the other trade route had been in existence, formed by the L. & N. in connection with the N., C. & St. L. When the case came

before the commission it appeared that the gross earnings on the two lines were substantially equal, which indicates that they each carried about the same proportion of the traffic.

Thus it was not a case of an application for leave to create a new, expensive route and for leave to foster that artificially by raising the rates on the prior and cheaper line. On the contrary, the question was whether the commission should exclude an old established trade route. The reasoning of the petitioners must carry them even to the proposition that the commission had the power to force the rate so low between the two points as entirely to destroy the old trade route and in fact confiscate the property invested in it and on the faith of it; and this without any indication as to whether the short line had equipment or capacity to carry the entire traffic or had capital within reach to obtain such equipment or capacity.

Furthermore, the longer and older trade route was plainly a reasonably direct one from a transportation point of view. It is not at all the case of an artificial effort to create a line, shaped like the tube of a trombone, traversing 2,000 miles to get 300.

It may be that the commission ought not to give any consideration whatever to an excessively and unreasonably long route; but unless the commission is to limit population and industry to a narrow strip of country mathematically in direct line be-

tween the terminal points, it necessarily follows that they must consider crescent routes. In this particular case, for instance, is it not reasonable policy for the commission to consider the development of the country between Cincinnati and Chattanooga at other points than those which happen to lie in the immediate mathematical plumb-line south?

Take the rate from Washington to St. Louis. Is the commission to determine the maximum rate between these two points with exclusive reference to the distance along a string stretched taut across the map from one of those points to the other? Yet that would seem to be the necessary consequence of the policy advocated by these petitioners.

On the contrary, for 25 years the trunk line roads which have the shorter lines between those two points have maintained a rate \$1.50 higher than they alone would be willing to accept, because the Chesapeake & Ohio, which is longer, needed that larger rate. The practice has not been questioned either by the public, the carriers, the commission, or the courts.

In fact, for a quarter of a century, the commission has taken this attitude and has considered railroad matters with reference to all reasonable lines of communications between the two points concerned (see III Interstate Commerce Commission Reports, 502; IV, *Ibid.*, 130, Food Products Investigation; 15 I. C. C., 376, Kindel case; 15 I. C. C.,

392, Spokane case; 16 I. C. C., 595, Duncan Company case) and this long-established policy has been left undisturbed by Congress.

The question whether or not it is wise to continue this policy is a legislative, and not a legal, question. It involves large problems of fact and of governmental policy and it should be left where the administrative and legislative bodies have left it.

*Prentiss v. Atlantic Coast Line*, 211 U. S., 224.

*I. C. C. v. C. N. O. & T. R. Ry. Co.*, 167 U. S., 479, 499, 500, 505.

*San Diego Land, etc., Co. v. Jasper*, 189 U. S., 439, 440.

*Burnham, Hanna, Munger case*, 218 U. S., 88, 103.

### III.

**The commission considered all the conditions urged by the petitioners and all other material conditions, and its conclusion that the 70 c. schedule fixed reasonable maximum rates under all the circumstances is a conclusion of fact and is not reviewable.**

All the facts alleged in the petition are stated by the petition itself to have been before the commission, and they are also alleged to be all the material facts. (R., 51.) Indeed, the record shows plainly enough that the commission received and considered all the considerations urged by the petitioner, balanced them along with all the other considerations affecting the question, and came to a conclusion that in view of all the facts the 70 c. schedule was reasonable.

The finality of the conclusion of the commission under such circumstances has been again and again and again and again announced by this court—indeed, so often that the court itself has held the repetition to be “tiresome.”

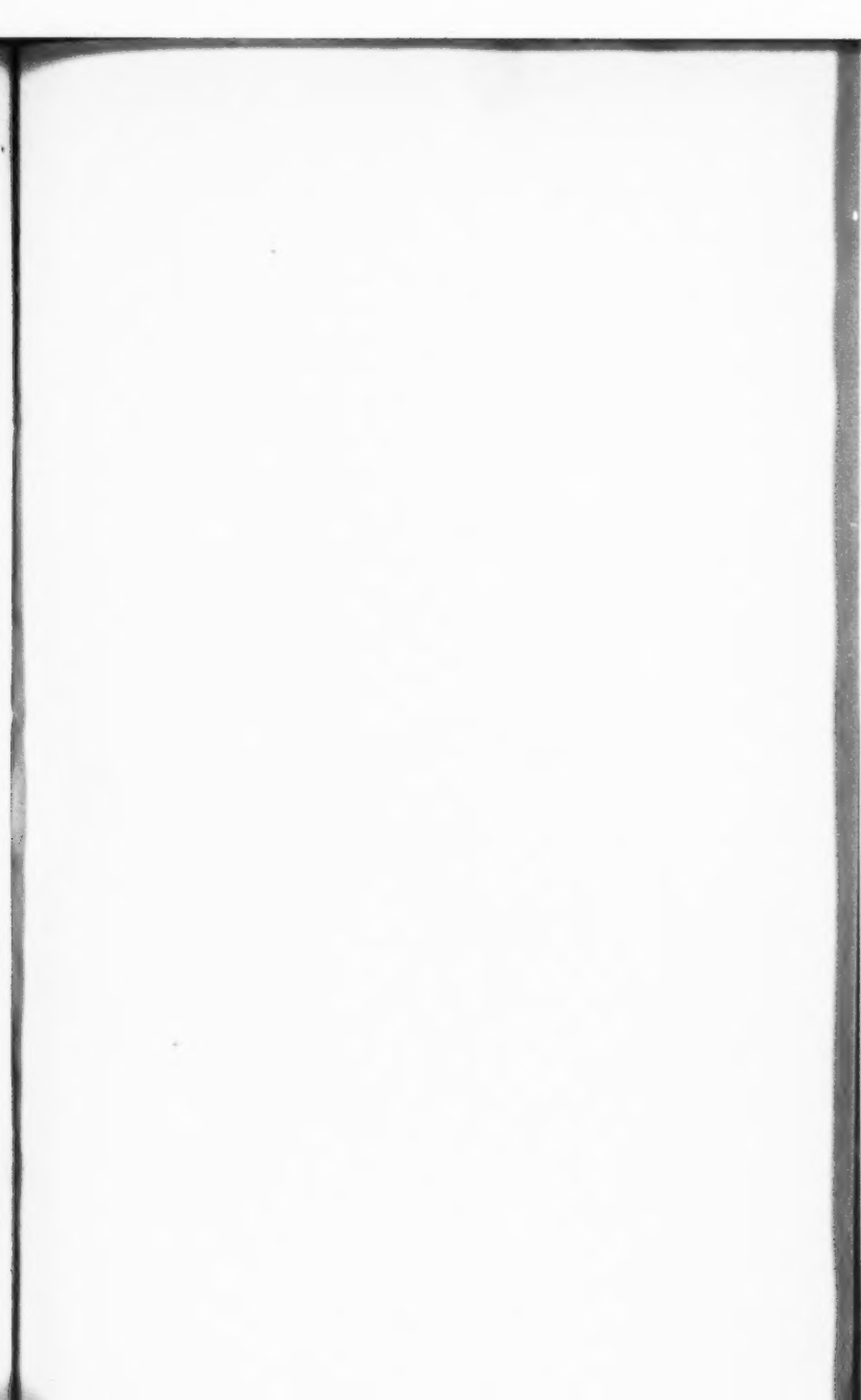
The decree should be affirmed.

WINFRED T. DENISON,  
*Assistant Attorney General.*

JANUARY, 1912.

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HOOKER v. KNAPP ET AL., MEMBERS OF THE  
INTERSTATE COMMERCE COMMISSION.

EAGLE WHITE LEAD COMPANY v. INTERSTATE  
COMMERCE COMMISSION.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 773, 774. Argued January 11, 1912.—Decided June 7, 1912.

Decided on authority of *Procter & Gamble v. United States*, ante, p. 282.  
188 Fed. Rep. 242, 256, reversed.

THE facts, which involve the jurisdiction of the United States Commerce Court, are stated in the opinion.

*Mr. Francis B. James* for appellants:

A shipper has equal right with a railroad corporation to bring a bill in equity to annul an order of the Commission. This right exists independent of and does not arise from statute. *Peavey v. Union Pacific Ry. Co.*, 176 Fed. Rep. 409; *Int. Com. Comm. v. Diffenbaugh*, 222 U. S. 42, 49.

United State Circuit Court and Commerce Court are both given jurisdiction of such action. Section 16, Act to Regulate Commerce, amended March 2, 1889, June 29, 1906, and June 18, 1910, and act creating Commerce Court, June 18, 1910.

"Against" means "in reference to," "concerning" or "touching" a carrier. *Silver v. Ladd* (1869), 7 Wall. 219;

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Argument for the United States.

*Seabright v. Seabright*, 28 W. Va. 412, 465. The statute defines venue and confirms jurisdiction.

The case at bar is within the express language of statute and the order assailed is not a negative one.

*Mr. Assistant Attorney General Denison*, with whom *Mr. Jesse C. Adkins* and *Mr. Blackburn Esterline*, Special Assistants to the Attorney General, were on the brief, for the United States:

No principle of law required the Commission to determine the reasonableness of rates exclusively with reference to the cost of transportation by the shorter route. On the contrary, this court has held that it is the duty of the Commission not to exclude other things from its consideration. *Texas & Pacific Ry. v. I. C. C.*, 162 U. S. 197, 199; *I. C. C. v. C., R. I. & P. Ry.*, 218 U. S. 103.

In this particular case the Commission had to consider not only the supposed interests of the individual petitioning shippers, but the interests of Cincinnati, of Chattanooga, of the intervening points, the relation of through rates, the rates on other lines in similar conditions, the growth and commercial needs of the country served, the value of the transportation to the shippers (which includes the possibility of their reaching the market at a profit), the commercial conditions, the effect on the communications of Cincinnati, Chattanooga, and intervening points with the West, and with the East, and many other details of fact and policy.

The question whether the Commission in determining the reasonableness of rates, shall adopt the policy of limiting its cognizance to the bee line, is a legislative and not a legal question. *Prentiss v. Atlantic Coast Line*, 211 U. S. 224; *I. C. C. v. C., N. O. & T. R. Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land &c. Co. v. Jasper*, 189 U. S. 439, 440; *Burnham, Hanna, Munger Co. Case*, 218 U. S. 88, 103.

The long continued practice of the Commission on this point has been left undisturbed by Congress and should not now be disturbed by the court. See 3 Interstate Commerce Commission Reports, 502; 4 *Ibid.*, 130, *Food Products Investigation*, 15 I. C. C. 376; *Kindel Case*, 15 I. C. C. 392; *Spokane Case*, 16 I. C. C. 595.

It is not a case of an application for leave to create a new, expensive route and for leave to foster that artificially by raising the rates on the prior and cheaper line. On the contrary, the question was whether the Commission should exclude an old established trade route, now carrying one-half the traffic; and this without any intimation as to whether the short line had equipment or capacity to carry the entire traffic, or had capital within reach to obtain such equipment or capacity.

Neither was it a case in which the longer route was an unreasonably roundabout line of communication between the two points.

Under the conditions of this record the conclusion of the Commission in determining the reasonable maximum rate is a pure conclusion of fact and is not reviewable; as has been held by this court again and again.

The Commerce Court had no jurisdiction of the petition, because the Commerce Court act did not include among the orders of the Commission which the Commerce Court might set aside, annul or suspend, orders of merely negative effect. This appears from the context and history. The context and other provisions of the act show that only enforceable affirmative orders were intended to be set aside. This also appears from the fact that no process is authorized appropriate to any relief against a non-active order. The Commerce Court is a court of original jurisdiction and not an appellate court which receives a record from a tribunal below. There is no line along which a mandate from the Commerce Court could move to the Commission directing it to reopen a case and

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Opinion of the Court.

give affirmative relief; nor is there any provision for mandamus in such a situation. It is not probable that Congress, if it had intended to give the Commerce Court this jurisdiction, would have left that court without any means of bringing itself to bear and thus made its judgment mere *brutum fulmen*.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. R. Walton Moore for Cincinnati, New Orleans & Texas Pacific Railway Company.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellants in these cases originally applied to the Interstate Commerce Commission for reduction of the maximum rates between Cincinnati and Chattanooga from the 76 c. schedule to a 60 c. schedule. The Commission refused to make the full extent of this reduction. Thereupon the respective parties filed bills in the Commerce Court demanding that the Commission's order be "suspended, set aside, annulled, and declared void and of no effect" and that the individual defendants and the Commission be required by mandatory injunction to set aside and annul the said order, that the case be reopened, and the complainants given further relief. The two bills were consolidated. The individual defendants, the Commission, and the Railroad Company all demurred to the bill on the merits. The United States moved to dismiss on the ground that the court had no jurisdiction. The court took jurisdiction, but dismissed on the merits. These appeals were then prosecuted. The cases are, in all respects, controlled by the opinion announced and ruling made in the *Procter & Gamble Case*, this day de-

Syllabus.

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cided (*ante*, p. 282) and for the reasons in that case stated, these cases must be and are remanded, with directions to dismiss for want of jurisdiction, and

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*It is so ordered.*

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